82-1215

No. A-443

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FREDERICK PAUL,
Petitioner,
v.

THE UNITED STATES
AND
BARRY JACKSON AND THOMAS FENTON,
Petitioner,
v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

Where lawyers contract with a quasi-public or quasi-sovereign entity (Indian tribe) for the purpose of petitioning the Congress for a redress of grievances related to cultural, ethnic and property issues (aboriginal rights); and where said contracts are in fact prescribed and approved by federal agency action (25 CFR Part 88 to 89) pursuant to Congressionally delegated authority (25 USC §81); and where such contracts call for the fees to be contingent upon a recovery for the benefit of the client as required by law (25 CFR §89.24), including as a result of future "action of Congress"; and where Congress, after performance, voids said contracts (43 USC §1621(a)).

a. Does the Petition Clause in general and the "Clear and Present Danger" Test in particular require the government to pay the reasonable value therefor as just compensation under the Fifth Amendment and the Tucker Act?

b. Are the contract rights vested so that the Due Process Clause requires the government to render just compensation under the Fifth Amendment and the Tucker Act?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Petitioners in these consolidated proceedings before the United States Court of Claims below, Frederick Paul, Barry Jackson and Thomas Fenton, hereby petition for a Writ of Certiorari to review the judgment of the United States Court of Claims, now United States Court of Appeals for the Federal Circuit, in this case.

OPINIONS BELOW

The opinion of the Court of Claims is reported at 687 F.2d 364 (1982) and is reprinted in the Appendix hereto (App. A1). The opinion of the Court of Appeals in the related case of *Paul v. Andrus* is reported at 639 F.2d 507 (9th Cir., 1980). The opinion of the District Court in that case is unreported. The opinion in the related case of *Jackson and Fenton v. U.S.* is reported at 485 F.Supp. 1243 (D.C. Alas., 1980).

JURISDICTION

The judgment of the Court of Claims (App. A1) was entered on August 25, 1982. This Court on application of Petitioners entered an ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI on November 16, 1982 by Order of the Honorable Warren E. Burger, Chief Justice, granting Petitioners request for leave to file the said Petition through January 20, 1983.

The jurisdiction of this Court is invoked under 28 USC §1255 as extant on August 25, 1982; and 28 USC §1254 and §403 of P.L. 97-164, 96 Stat. 57 *et. seq.*, (28 USC §171 Note)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States
Article I, §8 is printed at App. A12.
Article IV, §3 is printed at App. A12.
First Amendment is at App. A12.
Fifth Amendment is at App. A12.
18 USC §438 is at App. A14.
25 USC §81 is at App. A14.
43 USC §§1609, 1619 and 1621(a) are at App. A18.
25 CFR Parts 88 and 89 are at App. A15-17.

STATEMENT OF THE CASE

These actions came before the court below on the Petitioners' Motion for Partial Summary Judgment on the issue of liability, reserving for later consideration the issue of damages, and on the government's Cross-Motion for Summary Judgment of dismissal because no cause of action was stated. The government's motion was granted August 25, 1982 (App. A1) and the Petitioners' Motion was denied.

No issue of fact is presented.

Petitioner Frederick Paul is a Tlingit Indian of the Tee-Hit-Ton Tribe. His family has long been a champion of Indian rights, for example: *Tee-Hit-Ton Tribe v. United States*, 348 U.S. 272 (1955). All three Petitioners have been admitted to practice before all pertinent courts.

Petitioners are similarly situated lawyers who were retained by and represented a number of tribes, groups, bands, clans or individuals of Alaska Native descent between 1965 and 1971, which numbered approximately 10,000 persons. Their charge was in essence to take whatever action was necessary before state and federal courts, administrative agencies, legislative bodies and the Congress to protect the aboriginal land, culture and subsistence rights of their clients.

Their contracts of employment are, in substance, identical and called for a contingent fee in an "equitable amount," to be determined by either the Secretary of the Interior or an "independent tribunal" but in no event to exceed ten percent of any award of land or money recovered from any source *including* "action . . . of the Congress." (App. A25) The determination of an "equitable amount" was to be according to the standards of the American Bar Association. A sample of such contract is in the appendix at page A23.

This type of contract with Indian "tribes" for services related to their "lands" is subject to the prior approval of the Secretary of the Interior under 25 USC §81 (App. A14) and regulations thereunder codified in 25 CFR Parts 88 and 89 (April 1, 1982 ed.) (App. A15-16). 25 CFR §88.1(c) provides that "any" action of approval "shall be final." (App. A15)

> 25 CFR §89.24 (App. A18) provides in part:
> ". . . Unless congressional authority has been obtained for the use of tribal funds, the payment of attorneys' fees and expenses *shall be contingent upon a recovery by the Indians* in the matters or claims covered in the contract." (emphasis supplied)

These contracts were supplied to petitioners by the Secretary's authorized representative (25 CFR §89.18). They are standard in form and comparable to hundreds of contracts routinely approved by the Secretary or his authorized representative. The authorized representative, after execution by Petitioners and the Native clients, approved them in 1968 effective on the dates of execution in 1965 and 1966 variously.

They and other counsel on behalf of all Alaska Natives performed substantial services totaling in the aggregate in excess of 45,000 hours of work in that six year period. Petitioner Paul and

associate counsel performed approximately 15,000 hours of services and Jackson and Fenton performed approximately 2,400 hours of services. These services were in State and Federal courts, before the Alaska State legislature, administrative agencies and predominantly before committees of Congress. They contributed, in substantial part, to the enactment of the Alaska Native Claims Settlement Act of 1971, Pub. L. 92-203, 92nd Cong., 1st Sess., December 18, 1971, 85 Stat. 688, 43 USC §1600 *et. seq.* (hereafter ANCSA) (section references are to the Public Law numbering).

Sections 20 and 22(a) of ANCSA related to the payment of attorney fees.[1] Section 22(a) *eo instante* voided all percentage fee agreements which the government has conceded includes the instant ones. §20 substituted an alternative procedure for the payment of fees for a limited number of services, i.e. those related to

> "preparation of this act and previously proposed federal legislation to settle Native claims based on aboriginal title . . ." (§20(b)(1))

The statute as later interpreted did not provide for the payment of any fees for services outside that category, such as before administrative agencies, companion litigation in state and federal courts, before the Alaska State legislature, or advisory to the Native clients.[2] Fully half of their services comprehended by their contracts were excluded from the compensable category and were thus voided, *in toto,* under §22(a).[3]

Section 20 authorized not to exceed $1.9 million for the payment of attorneys' fees in the aggregate for all Alaska Native attorneys (§20(d)(4)). Determination of a proper fee was assigned to the Chief Commissioner of the Court of Claims under specialized hy-

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[1]The full text of §§20 and 22(a) appear at Appendix A19-23 hereto.

[2]The rulings, opinions and conclusions of the proceedings before the Chief Commissioner of the Court of Claims under §20 were not reported.

[3]The Chief Commissioner's authority did not extend to the interpretation of §22(a). However, in the related matters of *Paul v. Andrus,* 639 F.2d 507 (9th Cir., 1980) and *Jackson & Fenton v. U.S.,* 485 F.Supp. 1243 (D.C. Alas., 1980), separate causes of action for services beyond the reach of §20 were dismissed, presumably as requiring a Constitutional challenge to §22(a) which voided "percentage" contracts. It is thus "res judicata" that §22(a) in fact comprehended these contracts in their totality.

brid procedures to be established (§20(d)(7)). A review panel was also established but further judicial review was barred (§20(d)(8)). Payment or acceptance of remuneration for services comprehended by the Act was barred and any contract to the contrary voided. Violation was declared a crime punishable by fine and/or imprisonment (§20(f)).

Most significantly, the Act required if the total fees allowed for compensable services exceeded the $1.9 million in the aggregate, payment of the claims would be made on a "pro rata basis" (§20(d)(4)). Interest on the award was barred (§20(e)).

These Petitioners, together with 25 other claimants filed claims within one year of enactment as required by the statute. The claims in the aggregate exceeded the sum of $7 million. By December, 1974, three years after enactment, no claim had been adjudicated. By that date, the proceedings had accomplished solely the adoption of rules for the conduct of the hearings and preliminary proceedings with respect to the interpretation of the Act and the nature of the service compensable thereby. In December, 1974, the assembled claiming attorneys, recognizing that the period of adjudication to resolve the claims could take perhaps another three years or longer, worked out a settlement compromise amongst themselves with the aid of the trial commissioner.

The Chief Commissioner found as a fact that the fees so stipulated for services comprehended by §20 were, in the aggregate and in severalty, "at least equal" to the reasonable value respectively.

Petitioners contend their property rights in these personal services contracts are vested within the meaning of the Just Compensation Clause of the Fifth Amendment thus entitling them to money damages for their otherwise lawful taking by the Congress under the Indian Commerce Clause.

REASONS FOR ISSUING THE WRIT

The questions presented are matters of first impression before this Court. Their significance extends far beyond the narrow confines of this proceeding. The Court is being asked to consider the applicability of the Petition Clause and the "Clear and Present Danger" standard to the right of an attorney to be compensated for his services rendered in petitioning the United States for the

redress of the most substantial of cultural, ethnic, religious, sovereign and public grievances on behalf of a significant ethnic minority in their political, public and sovereign capacity. It is not solely limited to Indian law but pervades as a principle of law the plethora of subject matters over which the United States has chosen to regulate the attorney/client relationship within which there exists a significant grievance against the United States as comprehended by the First Amendment.

Secondly, this Court is being asked to consider the power of Congress to retroactively abrogate contract rights it has specifically approved through Congressionally delegated authority and upon which parties have acted and relied. Stated another way, whether a Congressional delegation of legislative approval charged to agency action of *specific* contractual relationships as exist in a wide variety of federally regulated industries may be subject to a second review or exercise of the police power as held by the Court below.

The decisions of this Court are in conflict with the Court of Claims below, but only by analogy. The specific question has not been before this Court generally, so far as Petitioners have been able to discern, on any subject matter, least of all in the area of attorneys' fee regulation.

The questions presented necessarily require the balancing of the *personal rights* conferred under the First Amendment Petition Clause (App. A12) and the Fifth Amendment Due Process and Just Compensation Clauses (App. A12) with the *express powers* conferred upon Congress under the Article I, Section 8 Indian Commerce Clause (App. A12), the Article IV, Section 3 (App. A12) power of Congress over the federal treasury and its inherent police power.

I. IT IS AN IMPORTANT FEDERAL QUESTION WHETHER THE PETITION CLAUSE AND THE "CLEAR AND PRESENT DANGER" STANDARD ARE APPLICABLE TO THE EX POST FACTO TAKING OF PROPERTY RIGHTS ARISING FROM A FIRST AMENDMENT PROTECTED ACTIVITY, SPECIFICALLY, THE PETITIONING OF THE GOVERNMENT FOR A REDRESS OF GRIEVANCES THROUGH PROFESSIONAL ADVOCACY, THUS ENTITLING PETITIONERS TO JUST COMPENSATION.

Heretofore, this Court has not had occasion to consider a fact pattern where the inhibitions to the petitioning of the government for a redress of grievances were inflicted after the protected activity had been completed.

Lawyers, as professional advocates, are an integral part of the petitioning process. The complexities and techniques of lobbying the Congress are simply too specialized so that the average citizen would otherwise be doomed to frustration and failure without a lawyer. In the instant case, the clients were Eskimos and Indians 5,000 miles from the seat of government, acting with the resources of bingo proceeds and an average mid-term, third grade education. The inability to secure and retain professional advocacy on their behalf would have reduced their petition to a laughable squeak.

The nature of the services rendered was the protection and advancement of the aboriginal rights of Indians and Eskimos, in part resulting in the enactment of the Alaska Native Claims Settlement Act. They were the type of services considered by this court in *Winton v. Amos*, 255 U.S. 373 (1921):

> "... According to the findings, the services rendered were in the nature of professional services before Congress and its committees... to establish the right of the Mississippi Choctaws to participation in the material benefits of citizenship in the Choctaw Nation and to secure such legislation by Congress as might be needed for the practical attainment of the object sought. The findings render clear that services of this nature, altogether proper in character – not lobbying in the

> odious sense – were rendered by these claimants under particular employment by many individual Mississippi Choctaws . . . We make no doubt that, for proper professional services rendered and expenses incurred in promoting legislation that has for its object and effect the rescue of substantial property interests for a class of beneficiaries under a trust of a public nature, it is equitable to impose a charge of reimbursement and compensation upon the interest of those beneficiaries who received the benefits . . ." Id. at p. 392.

Like *Winton*, the object of the petitioning attorney's services in the case at bar involved much the same kind of "rescue of substantial property interests for a class of beneficiaries under a trust of a public nature." That trust, of course, refers to the duty of the United States itself to its Native wards, be they recognized under treaty or not. *U.S. v. Kagama*, 118 U.S. 375 (1886); *Edwardsen v. Morton*, 369 F.Supp. 1359 (D.C., D.C., 1973); *Joint Tribal Council of Passamoquaddy v. Morton*, 528 F.2d 1370 (1st Cir., 1975).

The Court in *Winton* was quite clearly making a statement of public policy. It was in the public's good that attorneys be reasonably compensated and the beneficiaries of their services pay their equitable share for the benefit received in a matter serving the public interest. See e.g. *Sprague v. Ticonic National Bank*, 307 U.S. 161, 165-167 (1939); *Mill v. Electric Auto-lite*, 396 U.S. 375, 391 (1970); *Taylor v. Bemiss*, 110 U.S. 42 (1884).

In the absence of a compelling statement of public policy from the Congress to the contrary, that has always been the rule of law. Here, these petitioning attorneys were not solely engaged in a "private contract" involving the private claims of individual citizens, no matter how deeply aggrieved. Rather, it is far more akin to the concept of private attorneys general acting in the public interest. These petitioners represented several thousand of the Natives of Alaska in their political and, at least at that time, sovereign capacity.

While there is no doubt that lawyers in the interest of a few private clients can confer benefits upon the many in their private capacities, there is equally no doubt that they can also have a profound impact upon their clients' public and political being as well as upon vast numbers of persons similarly situated. During the past fifty years as a result of the nationally divisive labor and

civil rights movements, the role of law, litigation, lobbying and advocacy in the area of such political questions have enjoyed frequent redefinition. In *NAACP v. Button*, 371 U.S. 415 (1963), this Court struck down a state Bar effort to restrict the solicitation of discrimination cases as champertous because

> "[l]itigation may well be the sole avenue open to a minority to petition for a redress of grievances." Id. at p. 429.

In the labor area, the Court struck down an effort to restrict unions from hiring house counsel to represent members as to their rights under various federal labor statutes stating that the lawyers acting under such a constitutionally protected plan "have a like protection which the state cannot abridge." *Brotherhood of Trainmen v. Virginia Bar Association*, 377 U.S. 1, 8 (1964). In *Mineworkers v. Illinois Bar Association*, 389 U.S. 217, 221 (1967) this Court acknowledged the right of a union "to hire attorneys on a salary basis, to assist its members in the assertion of their legal rights."

The United States, in argument below, as well as the Court of Claims, if only for the purposes of argument and during the life of Petitioners' contracts, conceded that the penumbra of the First Amendment Petition Clause was indeed invoked by the circumstances of the attorney/client relationship that had in fact existed.[6] But because the limitation acted not against the contemporaneous exercise of the right but against a subsequent property right arising from the protected conduct, the Court dismissed the challenge as in effect, illusory.

> "Not only was there no prohibition of any kind on pursuit of any activities by either Natives or their lawyers, but even if the fee provision constituted some type of 'indirect restraint' there was and could be no discouragement of any of their activities respecting that particular settlement – the settlement act came *after* those activities, not before."[7]

Petitioners maintain that the critical focus must begin with the First Amendment protected conduct rather than the limitation. It matters not whether the limitation is invoked contemporaneous

[6] App. A7

[7] *ibid.*

with the conduct or subsequent thereto – it only matters whether the limitation was invoked as a product of the protected conduct.

> "... it is the character of the right, not of the limitation, which determines what standard governs the choice." *Thomas v. Collins*, 323 U.S. 516, 539 (1945)

That very delicate balance was described in *Thomas v. Collins* as follows:

> "Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our systems, where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment in the light of our constitutional tradition ... and the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this." 323 U.S. at 531-32.

As applied to "indirect restraints" and to the role of attorneys in the exercise of various clients' First Amendment rights, this Court went on to state in *Mineworkers v. Illinois Bar Association*, supra.

> "The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition or assembly as such. We have therefore repeatedly held that laws which affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the state's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. It is equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation sig-

nificantly impair the value of associational freedoms." 389 U.S. at p.222.

We thus pose the questions to this court:

a. Is there a distinction between the right of the aggrieved to hire on a contemporaneous salary basis as opposed to a future contigency? And if so, what is the distinction? Is it solely a function of the police power or does it include consideration of other express powers of the government, such as under Indian Commerce or over the federal treasury? Clearly, where the aggrieved is otherwise economically strong and can retain advocacy on a contemporaneous salary basis their petition will certainly be aired, but where the aggrieved cannot retain such advocacy except on a contingency, after the fact basis, lest the rule of law give that retainer equal stature in the law, only rarely and only for the most fundamental of issues will the grievance see the light of day.

b. Is there a distinction between a limitation imposed upon the contemporaneous exercise of a First Amendment liberty in the form of a "prior restraint" and a rule of law which might arbitrarily and punitively act on a professional advocate after the conclusion of the protected First Amendment activity? And if so, what is that distinction? Particularly where professional advocacy is involved, ought not the rule of law be that the advocate be impelled solely by his client's grievance, rather than the threat or fear of incurring the wrath of Congress to his personal discomfort? Let the moment of the grievance define the advocates rights, not the arbitrary and wrathful arm of Congress.

Petitioners respectfully urge the questions establish the importance of the issues posed and indeed, supply their own answers.

II. IT IS AN IMPORTANT FEDERAL QUESTION WHETHER THE CONGRESS IS EMPOWERED TO RETROACTIVELY TAKE PROPERTY RIGHTS ENJOYED BY A LAWYER IN A PROFESSIONAL SERVICES CONTRACT WHICH HAD PREVIOUSLY BEEN PRESCRIBED AND APPROVED BY AGENCY ACTION PURSUANT TO CONGRESSIONALLY DELEGATED STATUTORY AUTHORITY, WITHOUT JUST COMPENSATION?

This Court has had many occasions to address what may be called the "right to rely" upon administrative action. It is a form of estoppel. The cases of this court have honored "the right to rely" upon specific administrative regulations, *U.S., ex. rel., Accardi v. Shaughnessy*, 347 U.S. 260 (1954), on regulations as interpreted, *Morton v. Ruiz*, 415 U.S. 199 (1973), on announcements of policy, *CBS v. U.S.*, 316 U.S. 407, 422 (1942) and secretarial orders, *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959), to name a few.

This Court has not yet, however, apparently addressed the problem of the power of the Congress itself to retroactively, after performance and after reliance, to change the rules which the government has imposed upon a specific regulated class of engagement. The Court of Claims in its decision below held that the principles of law enunciated in such cases were inapplicable to the power of Congress to so act, stating such cases "had no constitutional overtones at all, and rested wholly on the Court's construction of the then governing Congressional legislation dealing with the [regulated industry]".[8]

It is time for the Court to denominate the rule enunciated in *Arizona Grocery v. Atcheson R.R. Co.*, 284 U.S. 370 (1932) as a constitutional principle.

The facts of this case first: The Congress in 1871 adopted substantively the present form of 25 USC §81 which was intended to insure that unscrupulous lawyers and claims agents would not take any undue advantage of Indian clients. Without Secretarial approval, such contracts were declared "null and void." The mere receipt of compensation without such approval is a crime. 18 USC §438 (App. A13)

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[8]Appendix A9

In the instant case, Petitioners received such approval effective with the contracts' execution by the parties. The professional services rendered the clients culminated in ANCSA. §22(a), *eo instante* with enactment, voided all contingent fee contracts including Petitioners. In proceedings below this is conceded.

Alternatively to the contract rights enjoyed, the Congress in §20 provided for a limited fund for a narrowly defined class of professional services. The petitioners claim that as to fully half of their activities involving thousands of hours of labor, that they have been paid nothing because such services were excluded from the narrow class of compensable services; and secondly, they claim that the amount they received from the limited fund for compensable services is unreasonably low and in contravention of their approved contracts.

The leading case involving the retroactive changing of rates upon which a regulated industry has relied is *Arizona Grocery v. Atcheson R.R. Co.*, supra. There, this Court considered a fact pattern where the Interstate Commerce Commission had approved rates pursuant to notice and hearing, *in futuro*. A year later, maintaining a mistake of fact at its original hearing, the ICC attempted to retroactively reduce tariffs that had been previously charged, relied upon and which were within the approved rate schedules. These actions, the Court held, combined a quasi-legislative and quasi-judicial function pursuant to a delegation of power from the Congress. Though the facts of *Arizona Grocery* related to an effort by the administrative agency to retroactively reverse its own "final agency action," an act found beyond the agency's delegated powers, the specific language of the opinion sets the standard as to that action's

> "... validity as would be an act of Congress intended to accomplish the same purpose." 284 U.S. at p. 388.

The Court went on to hold that where an administrative agency or presumbably the Congress or a combination thereof

> "... has made an order having a dual aspect, it may not, in a subsequent proceeding, acting in its own quasi-judicial capacity, ignore its own pronouncement promulgated in its own quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness as to the rate it has prescribed." Id. at p.389

In sum, the Congress required prior approval of the attorney/client contractual relationship. Such approval was given. The services comprehended by such contracts included the petitioning of the Congress for the redress of grievances. Petitioners, on behalf of several thousand Indians and Eskimos, did just that, petitioned the Congress for the redress of grievances approaching 100 years in standing. Though the Congress undeniably was generous in honoring the grievances so presented, the Congress acted with a vengeance upon those contracts and voided them in their entirety, resurrecting but a modest pittance.

May the Congress do so with impunity and without just compensation?

III. THE AUTHORITIES RELIED UPON BY THE GOVERNMENT TO SUSTAIN THE LOWER COURT DECISION ARE INAPPOSITE AND DISTINGUISHABLE UNDER THE FACTS OF THE CASE AT BAR, BUT NONETHELESS NEED TO BE RECONCILED WITH THE PETITION CLAUSE AND DUE PROCESS RIGHTS OTHERWISE CONSIDERED HEREIN FURTHER DEMONSTRATING THE IMPORTANT FEDERAL QUESTIONS PRESENTED.

The Respondent in the court below argues that the Congress can void Petitioners' contracts with impunity under three rationales: (1) the power of private parties to contract is always subject to Congress' dominant constitutional power; (2) the power of Congress to control the federal treasury; and (3) the power to regulate Indian commerce.

Petitioners initially point out here that none of the cases relied upon by the Respondent or the court below involved subsequent Congressional action, after performance, allegedly affecting and chilling a First Amendment right nor did any involve the voiding of a previously federally regulated activity. The rule that a previously decided case is not *stare decisis* when similar facts are challenged by different interests or on different grounds is applicable. As Mr. Justice Holmes stated in *Quong Wing v. Kirkendall*, 223 U.S. 59 at p. 64 (1912):

> "[l]aws frequently are enforced which the Court recognizes as possibly or probably invalid if attacked by a different interest or in a different way."

Accord: *Mengelkoch v. Industrial Welfare Comm.*, 442 F.2d 1119, 1124 (9th Cir., 1971); and *Gendron v. Saxbe*, 502 F.2d 1087, 1088 (9th Cir., 1974).

In *Calhoun v. Massie*, 253 U.S. 170 (1920) this Court considered the power of Congress to limit a fee payable from an appropriation made in satisfaction of a Court of Claims award as the result of a gratuitous appropriation of the Congress. Prior to that time, contingent fee, percentage contracts from such awards had been favorably sustained by this Court absent, however, any effort by Congress to generally or specifically restrict the size of the fee award. *Taylor v. Bemiss*, supra; *Staton v. Embery*, 93 U.S. 548. In *Calhoun*, this Court in a 5-4 decisions by Mr. Justice Brandeis held the limitation to 20% as contrasted to Calhouns' 50% contract, was proper.

> "The Constitutionality of such legislation, although resembling in its nature the exercise of the police power, has long been settled . . ." 253 U.S. at 174

Accord: *Kendall v. U.S.*, 74 U.S. 113, 114, 118 (1868); *Frisbee v. U.S.*, 157 U.S. 160, 165-66 (1895); *Ball v. Halsell*, 161 U.S. 72 (1896); *Capital Trust Co. v. Calhoun*, 250 U.S. 208, 213-14, 218-20 (1919).

The *Calhoun* Court also attached significance to the fact there was no general or special statute which conferred any *right* of recovery upon the client. Thus, the attorney would have to be in a position that as recognition of the claim would be dependent upon Congress' gratuitous grant, he necessarily had to be aware that the grant could come with strings attached. Thus, insertion of such a limitation would be one "he might reasonably have contemplated would be required to insure its passage." 253 U.S. at 177.

Here, to the contrary, however, Petitioners proceeded under a regulatory statute, which, pursuant to the approved contract, included a provision that granted them an equitable fee as a result of future "action of the Congress." If a reasonable contemplation attaches to these facts, it is clearly to the contrary. What other purpose would be served by the approval process? While here no statute or rule of law conferred upon Alaska's Natives a right of

recovery, a statute or rule of law did exist conferring upon the attorney a right of recovery *if* Congress honored the Natives' claims. It is, by analogy, the same kind of recognition of a right to a fee involved in Federal Tort Claims actions, for example, granting a maximum percentage fee.[9] It is too bizarre to contemplate that Congress, particularly without findings of fact, could after the fact of performance, arbitrarily reduce an authorized 20% contingent fee to say 10% or bar its payment whatsoever, even though tort claims require the gratuitous, if you will, waiver of sovereign immunity. Thus, to the extent *Calhoun v. Massie* is defensible on police power grounds for the reasons stated, the facts of this case depart radically.

By analogy, that question ought be fully answered by the "right to rely" analysis heretofore considered.

Admittedly there is a class of cases upholding the power of Congress to interfere with and regulate existing contracts where they interfere with the exercise of a paramount power of Congress, such as *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935), one of the Gold Standard Cases, which held:

> "Contracts may create rights of property but when contracts deal with a subject matter which lies within the control of the Congress they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.
>
> "[Congress has the power] . . . expressly to prohibit and invalidate contracts although previously made and valid when made, when they interfere with the carrying out of the policy it is free to adopt." Id. at p. 307.

Accord: *The Legal Tender Cases*, 79 U.S. 457, 549-57 (1872); *Lynch v. U.S.*, 292 U.S. 571, 579 (1934); *Larionoff v. U.S.*, 533 F.2d 1167, 1179 (D.C. Cir., 1976) aff'd 431 U.S. 864 (1977).

Here, that paramount Constitutional power is argued to be the Indian Commerce power (Art. I, §8) and the treasury power (Art IV, §3).

Under the foregoing rule in the field of attorneys' fees, it has been held:

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[9]28 USC §2678

> "... no right to compensation from public monies for legal services rendered *private* litigants springs from the constitution and ... *the service levies on the federal treasury only in the event and the extent that a statute authorizes it.*" *DeRodulfa v. U.S.*, 461 F.2d 1240, 1256 (D.C. Cir., 1972) (emphasis supplied)

The rule that the Congress has plenary power within an enumerated power contained in the Constitution, however, has its limitations. In adition to the exception quoted above from *DeRodulfa*, where, as here, Congress has affirmatively recognized or ackowledged the property right in question, the Congress is limited. We cite the Court to three separate strains of cases for this proposition.

First, aboriginal title. There is no question that *un*recognized aboriginal rights of Native Americans may be taken without just compensation. *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272, 291 (1955). Once recognized, however, by treaty or otherwise, these property rights are protected by the Just Compensation Clause of the Fifth Amendment. *The Walapai Case*, 314 U.S. 339 (1941); *Shoshone Tribe v. U.S.*, 299 U.S. 476 (1937). As the Court stated in the latter case:

> "The [Indian commerce] power does not extend so far as to enable the government to give the tribal lands to others, or to appropriate them to its own uses, without rendering, or assuming its obligation to render, just compensation ..." 299 U.S. at 496.

Secondly, the power of Congress over monetary policy and its power to borrow on the credit of the United States. There is no question that the United States is empowered to set general monetary policy as is so clearly described in *The Legal Tender Cases*, supra and *Norman v. Baltimore & Ohio R.R. Co.*, supra. But though it has the power to set *general* monetary policy, with respect to the *specific* engagements of the United States under its power to borrow, the Court considered in *Perry v. U.S.*, 294 U.S. 330 (1934) whether the promise of the United States to pay on its *specific* contractual obligations (as opposed to general enactments) occasioned by the act of one Congress could be abrogated by a subsequent Congress in the implementation of its constitutional authority to establish monetary policy. Stated conversely, could

the act of one Congress foreclose a subsequent Congress from the free and unfettered exercise of its enumerated powers? The answer of the Court in *Perry* was yes, that one Congress could foreclose a later Congress from adopting a policy which, in the absence of the prior act, it would later be free to adopt.

> "To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our government." 294 U.S. at 351.

See also: *The Sinking Fund Cases*, 99 U.S. 700.

Thirdly, we remind the Court of the "right to rely" cases heretofore addressed.

Collectively, these cases stand for the premise that where the United States has affirmatively acted upon a *specific* contractual relationship upon which parties have relied, however defined, however obscured, whatever called, people indeed have a right to the benefit of those bargains.

We do, of course, recognize that these cases support Petitioners' position only by analogy. Indeed, in *Perry*, supra, it specifically distinguished its facts from the power of Congress "to control or interdict the contracts of *private* parties when they interfere with the exercise of its constitutional authority," in the absence, however, of prior regulation. 294 U.S. at 350. But the principle is nonetheless the same, where, as here, the act of one Congress by delegated action of a federal agency has affirmatively acted, in the form of a pledge, oath, affirmation or promise on a particular contractual relationship and where parties have relied upon that affirmative action, we have not found a single line of authority which has sustained the power of Congress to abrogate such rights with impunity. We can conceive of no "vainer" promise than the authorized approval of a private contract, not to mention a quasi-public contract, by the force and effect of one Congress repudiated by a subsequent Congress. And if there be a distinction between the force and effect of a promise by the government to pay from its own account as contrasted to a promise by the government to allow the payment of an obligation from the account of a third party, it escapes apparency.

In sum, these powers have never been reconciled with the personal liberties reserved to the people under the First and Fifth Amendments. No doubt Congress believes it has plenary power in this regard. Petitioner pray this Court disabuse it of such a misapprehension of the reach of the First and Fifth Amendment.

IV. IT IS AN IMPORTANT FEDERAL QUESTION, UNDER THE CIRCUMSTANCES OF THIS CASE, WHETHER PETITIONERS RELIEF IS FOR AN INJUNCTION IN THE DISTRICT COURT OR FOR MONEY DAMAGES IN THE COURT OF CLAIMS.

Petitioners in *this* proceeding do not challenge the "legality" of the taking of their personal services contract rights.[10] Rather, Petitioners concede the power to take in the exercise of Congress' Indian Commerce power. Though Congress may take, however, that does not answer the question of whether it can take without just compensation.

A challenge to the legality of an act necessarily invokes analysis of equitable relief. To be entitled to such relief, one must have an "inadequate remedy at law." An inadequate remedy at law simply means the right at issue is incapable of conversion to money damages. Clearly, First Amendment associational freedoms and one's right to due process are such rights.

But here, while those First and Fifth Amendment rights are indeed invoked, they are invoked for the limited purpose of defining the property right at issue at a time long since past. Associational and procedural rights are living, contemporaneous rights, not capable of enforcement or preservation tomorrow or next year. Were this case one in which a direct limitation, a prior re-

[10]§10 of ANCSA (App. A18-19) barred any challenge to the "legality" of ANCSA lest brought within one year of enactment, in the Federal District Court for Alaska *and* by "an authorized official" of the State of Alaska. In the related litigation, Petitioners initially challenged the legality of §§20 and 22(a) of ANCSA, both of which were dismissed as out of time under §10, despite the "doubtful" constitutionality of the "authorized official" language. *Paul v. Andrus*, 639 F.2d 507 (9th Cir., 1980); *Jackson & Fenton v. U.S.*, 485 F. Supp. 1243 (D.C. Alas., 1980) In this proceeding, Petitioners are *not* attacking the "legality" of ANCSA. The illegality is confined solely to the failure to pay just compensation, not the power to take.

straint, if you will, existed, that would be a different question. But where no contemporaneous exercise of a right is at issue, the analysis takes a much different approach.

This is an action for money damages, no more, nor less.

Property rights come into being for many, many reasons. Some are protected by the Just Compensation Clause, some are not. If what is taken is merely property, the Tucker Act is one's sole avenue of relief. As Justice Brandeis put it in *Hurley v. Kinkaid*, 285 U.S. 95, 104 (1932)

> "... the *illegality* on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law."

There can be no doubt that Congress in the resolution of claims of aboriginal title has vast plenary powers. And those powers may contravene many property rights caught in the web of what Congress deems necessary to effect a settlement. But if the taking is within the power, there is no relief for an injunction, only money damages. See *Dugan v. Rank*, 372 U.S. 609, 611 (1963); *Fresno v. California*, 372 U.S. 627, 629 (1963).

In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Iranian hostage case, the issue is put in perspective. In question was the power of the President, in the exercise of his express Executive powers as well as certain Congressional enactments empowering the President to act in emergent situations, to suspend American business claims against Iranian assets located in this country. The Court held:

> "... where, as here, the settlement has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and, where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims." 453 U.S. at p. 688.

Thus,

> "... to the extent Petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the

United States Court of Claims under the Tucker Act." Id. at p. 689-90.

Similarly, in *Shoshone Indians v. U.S.*, supra, the Court approved, in effect, the "taking" of treaty protected property rights.

> "The power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of the treaty. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564, 566. The power does not extend so far as to enable the government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering or assuming an obligation to render, just compensation . . .'" 299 U.S. at 497.

This Court has had a long history of judicial restraint in limiting the exercise of the express powers enjoyed by its sister branches of government. Conversely, it has had a long history of judicial activism in protecting the personal and property rights impacted by that exercise.

We ask no more, nor less.

CONCLUSION

Petitioners urge that when the Congress delegates supervision of contracts between attorney and client which comprehends petitioning the government for a redress of grievances and such delegated authority prescribes contingent fees in an equitable amount for such services, that upon performance by the lawyers after which the Congress voids such contractual rights, it is an important federal question whether just compensation must be paid by reason of the Petition Clause as an indirect inhibition thereof; and

by reason of the Due Process Clause which vests the contract rights on its initial regulation.

Wherefore, Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Federal Circuit to review these cases on the merits.

Respectfully submitted,

BLAIR F. PAUL
Counsel of Record
for the Petitioners

Of Counsel:
Frederick Paul
Roger W. Johnson
Barry Jackson

APPENDIX

APPENDIX

In the United States Court of Claims

(Decided August 25, 1982)

No. 566-77

FREDERICK PAUL v.
THE UNITED STATES

No. 593-77

BARRY JACKSON and THOMAS FENTON v.
THE UNITED STATES

Blair F. Paul, attorney of record, for plaintiffs. *Paul, Johnson, Paul & Riley,* of counsel.

Susan V. Cook, with whom was *Assistant Attorney General Carol E. Dinkins,* for defendant. *Thomas J. Riley,* of counsel.

Before DAVIS, KASHIWA and SMITH, *Judges.*

DAVIS, *Judge,* delivered the opinion of the court:

Plaintiffs are attorneys who say that they entered into valid contracts with Alaska Native groups and entities to perform legal services (in connection with the Natives' land claims in Alaska), but did not receive the payment to which they claim to be entitled

under those fee-arrangements because the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§1601 *et seq.* (the Settlement Act), severely restricted such attorneys' compensation. Their claim here is that this part of the Act amounted to a taking of their property (the pre-existing right to fees) for which they should receive just compensation from the United States. Both parties here moved for summary judgment,[1] and after oral argument we hold that the case should be decided for the defendant without remand for fact-finding.

I

The agreements plaintiffs claim to have made with Alaska Native bodies were consummated in 1966-1968. There is a sharp dispute over the validity of all these agreements except three made by plaintiffs Jackson and Fenton (with the Alaskan villages of Minto, Nenana, and Tanacross). For the purposes of this case, however, we assume (without in any way deciding) that all of the fee-arrangements plaintiffs claim to have made were valid and accepted (or assumed to be accepted) by the Interior Department. Each of the agreements contained a compensation clause giving plaintiffs contingent compensation (contingent on the Natives' receipt of benefits) in an amount "equitably due," but not to exceed 10 percent of the recovery.

We shall also assume, without deciding, that (a) plaintiffs performed substantial legal services (in an amount worth more than they received under the Settlement Act, see *infra*) and (b) their clients received benefits in an amount which could sustain greater recovery by plaintiffs than they actually obtained under the Settlement Act.[2]

In 1971, Congress enacted the Settlement Act under which the Natives of Alaska received, without need for litigation, large amounts of land and money in settlement of their claims of aboriginal land ownership. *See* generally, *United States* v. *Atlantic Richfield Co.*, 612 F. 2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888

[1] Plaintiffs' motions are for partial summary judgment involving only certain of plaintiffs' claimed fee-arrangements, and only the question of liability. Defendant's motion is for full summary judgment and asks for the entire dismissal of both petitions.

[2] Defendant does not concede these assumptions.

(1980). The considerable sums of money provided by the Act were deposited in the Alaska Native Fund. Section 6(a) of the Settlement Act, 43 U.S.C. § 1605(a).[3] The Fund has been distributed as called for by the Settlement Act.

The Act outlined in detail the method for paying attorneys who had participated in the legislative settlement or in the court prosecution (or before the Indian Claims Commission) of a claim required to be dismissed by the Act as part of the settlement. Section 20, 43 U.S.C. § 1619. Claims of that type were to be presented to the Chief Commissioner of this court who would hear and determine them. The total amount of legal fees, however, was limited by Congress to $1,900,000 ($100,000 going to consultants), to be paid out of the Alaska Native Fund; if the approved claims exceeded that aggregate amount, the Chief Commissioner was to authorize payment of the claims on a pro rata basis. Section 20(d)(4), 43 U.S.C. § 1619(d)(4). The Act also prohibited receipt by a claiming attorney of additional compensation (of the type properly includable in a fee claim under the Act) and made it a criminal offense to receive such extra remuneration. Section 20(f)(1) and (2), 43 U.S.C. § 1619(f)(1) and (2). Finally, Congress forebade payment of any part of the revenues and land granted by the Settlement Act under any attorney contract providing for a percentage fee, and made such fee contracts unenforceable against Alaskan Natives. Section 22(a), 43 U.S.C. § 1621(a).

The three plaintiffs filed claims with the Chief Commissioner under the Settlement Act. In December 1974, all the attorneys who filed such claims agreed on the portion of the total compensation each should receive.[4] Under this stipulation and after taking account of the compensable legal work performed, the Chief Commissioner allowed plaintiff Paul (and his firm) the amount of $697,000 (Paul receiving $276,000 personally). Jackson and Fenton received $130,082. The maximum of $1,900,000 was divided among all the claiming attorneys.

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[3] This money came from two sources: (1) congressional appropriations totalling $462.5 million by fiscal 1981, and (2) contributions (ultimately totalling $500 million) by the State of Alaska and the United States from mineral leasing receipts. See section 9 of the Settlement Act, 43 U.S.C. § 1608.

[4] The total claims exceeded the $1,900,000 allowable.

II

Before the present suit was pursued, plaintiffs sought through other litigation to recover additional sums for their legal work. Paul sued – naming as defendants several federal officials, Alaskan entities organized under the Settlement Act, and the parties to his retainer contracts – in the Western District of Washington. He sought all kinds of relief, including a holding that sections 20 and 22 of the Settlement Act, *supra,* were unconstitutional. The District Court ruled that it had no jurisdiction because section 10 of the Settlement Act confined litigation challenging the constitutionality of the Act to timely suits in the District of Alaska.[5] In 1980, the Ninth Circuit affirmed. *Paul* v. *Andrus,* 639 F. 2d 507. Both the District Court and the Court of Appeals held the time and venue provisions of section 10 to be valid, even though the limitation of party plaintiffs to Alaska officials might well be unconstitutional. Paul's suit was dismissed because he filed it nearly three and one-half years after the time limitation (December 18, 1972) established in section 10, and he did not file suit in the District of Alaska.[6]

The current suits for just compensation were reactivated and pursued after the failure of the District Court litigation.

III

The thrust of plaintiffs' present position is that (a) the limitations on attorney compensation embodied in sections 20 and 22 of the Settlement Act (see Part I, *supra*) are invalid unless the Act is construed as an eminent domain taking of plaintiffs' pre-existing contract rights for which they were not properly compensated through the Chief Commissioner's proceedings in this court, and (b) the Settlement Act must therefore be understood as such a

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[5] Section 10, 43 U.S.C. § 1609(a), provided that the complaint in such a suit had to be filed within one year of December 18, 1971, and in the District Court for the District of Alaska, and had to be "commenced by a duly authorized official of the State" of Alaska.

[6] Jackson and Fenton filed a late suit in the District of Alaska seeking additional compensation. The Distict Court decided that case adversely to the plaintiffs on a number of grounds, 485 F. Supp. 1243 (1980). After *Paul v. Andrus,* Jackson and Fenton dismissed their appeal to the Ninth Circuit, recognizing the *Paul v. Andrus, supra,* controlled their case as well.

taking. There are at least three major defects in that contention.

The first is that plaintiffs are now precluded from challenging the constitutionality of sections 20 and 22, and we are precluded from considering those provisions as invalid. Not only is the Ninth Circuit's ruling in *Paul* v. *Andrus* binding on plaintiffs under the principles of former adjudication,[7] but we agree with that holding and believe it to be correct. Congress deliberately adopted the time and venue restrictions of section 10 because, as that provision explicitly puts it: "The purpose of this limitation on suits is to insure that, after the expiration of a reasonable period of time, the right, title, and interest of the United States, the Natives, and the State of Alaska will vest with certainty and finality and may be relied upon by all other persons in their relations with the State, the Natives, and the United States." Section 10.

That stated objective, as *Paul* v. *Andrus* said, is a rational ground for the time and venue restrictions (regardless of the possible unconstitutionality of the restriction to the State of Alaska of the sole right to make all constitutional challenges).[8] Under the Supreme Court's jurisprudence, reasonable time and venue limitations of that type are constitutionally acceptable. *See, e.g., Lockerty* v. *Phillips*, 319 U.S. 182 (1943); *Yakus* v. *United States*, 321 U.S. 414 (1944).

Plaintiff Paul made no showing in *Paul* v. *Andrus* why he could not have filed a timely suit in Alaska attacking sections 20 and 22, and plaintiffs here have done no better. Having failed to pursue the special route Congress opened to them, they are barred from asking us to consider sections 20 and 22 as invalid in any way. Conversely, we cannot take that view, without transgressing Congress' express direction as to the method for constitutional attacks. It follows that we have no basis in the putative invalidity of sections 20 and 22 (considered by themselves) for holding that

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[7] Several federal officials were parties defendant in that suit (Andrus was the Secretary of the Interior) and they were sued because of their official status. *Paul v. Andrus* meets the former rule that the defense of prior adjudication applies only where there is mutuality. In addition, plaintiffs are bound under the more modern concept that one full chance to litigate is normally enough, even in the absence of mutuality.

[8] The Settlement Act contains a severance clause which would separate the party limiation from the time and venue restrictions. *Paul* v. *Andrus*, *supra*, 639 F.2d at 509.

Congress must have exercised its eminent domain powers in order to save those otherwise (assumedly) invalid provisions.

IV

The second, independent flaw in plaintiffs' argument is that, even if we are wholly free to assess the validity of sections 20 and 22, we cannot see those provisions as unconstitutional. There is a long history of legislation and administrative action limiting an attorney's share of the funds he helped to procure from the Federal Government, despite a private contract he may have, or have had, with the client for whom he obtained the federal money. In the field of native rights, Indian statutes are prime examples, especially the Indian Claims Commission Act, 25 U.S.C. §70 *et seq.* (1976) and the regular practice of the Bureau of Indian Affairs (in approving attorneys' contracts) to restrict the amount of legal compensation. The Supreme Court has repeatedly upheld such limitation provisions in various contexts. *Kendall* v. *United States,* 74 U.S. 113, 114, 118 (1868); *Frisbie* v. *United States,* 157 U.S. 160, 165-66 (1895); *Ball* v. *Halsell,* 161 U.S. 72 (1896); *Capital Trust Co.* v. *Calhoun,* 250 U.S. 208, 213–14, 218–20 (1919); *Calhoun* v. *Massie,* 253 U.S. 170, 173–75, 176–77 (1920); *Margolin* v. *United States,* 269 U.S. 93, 101–2 (1925); *Hines* v. *Lowrey,* 305 U.S. 85, 91 (1938). The restrictive legislation can apply to pre-existing attorney-client contracts as well as to those made after the limiting legislation was passed. *Capital Trust Co.* v. *Calhoun, supra,* 250 U.S. at 219; *Calhoun* v. *Massie, supra,* 253 U.S. at 176–77.

The core reasons for the validity and retroactive application of such provisions are that (a) the payment of federal funds cannot be made without legislation consenting to suit against the United States or authorizing the payment of federal money to the claimants, (b) Congress has the authority to mold and limit its consent to suit and its award of monies, and (c) in making attorney or client contracts the parties must be aware, particularly in view of much past practice (now well over a century old), that Congress could be "unwilling to enact any legislation without assuring itself that the benefits thereof would not inure largely to others than those named in the act." *Calhoun* v. *Massie, supra,* 253 U.S. at 176-77.

This consistent line of decisions sustaining restrictions on attorney fees (where federal monies are involved) directly controls the present cases. The Settlement Act obviously provided federal

funds for Alaska Natives and plaintiffs admit that the objectives of the attorney restrictions in sections 20 and 22 were to protect and maximize the amount of the settlement to be received by the Natives themselves. *See* H. Conf. Rep. No. 581, 92d Cong. 1st Sess. 47 (1971); S. Rep. No. 405, 92d Cong. 1st Sess. 174 (1971). If there be any requirement that the amount received by the attorney under the statute be reasonable (a condition not enunciated in any of the Supreme Court opinions), we cannot say that the sums received by plaintiffs as a result of the Chief Commissioner's proceedings (see Part I, *supra*) under section 20 were less than the reasonable minimum.[9]

Plaintiffs seek to differentiate themselves on two grounds from the earlier decisions limiting fees. One basis is that the First Amendment requires minority peoples like Alaskan Natives to be able to obtain legal representation in order to vindicate their land rights, and that the restrictions of sections 20 and 22 improperly interfere with that First Amendment right. We may assume that the First Amendment is somehow implicated in the Natives' legal representation, but we cannot agree with plaintiffs that there had to be a "clear and present danger" before Congress could impose the attorney-fee limitations of the Settlement Act. Any connection between those limitations and the Natives' First Amendment rights was tenuous at best. Not only was there no prohibition of any kind on pursuit of any activities by either Natives or their lawyers, but even if the fee provision constituted some type of "indirect restraint" there was and could be no discouragement of any of their activities respecting that particular settlement – the Settlement Act came *after* those activities, not before. If the Act had any effect in discouraging the future retaining of lawyers by Indians or Natives, that impact would not bear on the Natives' rights involved in the Alaskan Settlement Act. Nor were plaintiffs' own rights to represent their clients affected by the Act in any way whatever. More than that, the history of fee limitations (where federal money is involved) shows little deterrent effect on

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[9] At the oral argument, counsel for plaintiffs said that Paul received compensation in the Chief Commissioner's proceedings at the rate of $10-12 per hour (present value). For the pre-1971 period, involved here, that does not seem outrageous, even if Paul would have received more if his fee contracts were fully enforceable.

the obtaining of lawyers by those seeking federal funds, but rather a solid and continued belief in Congress that serious abuses could and would result from the failure to establish fee limitations. We cannot believe that the Indian Claims Commission Act, for instance, has trenched on the First Amendment rights of the many tribes and groups covered by that statute.[10]

The second ground plaintiffs urge for excepting their case from the established decisions upholding fee limitations is that here Congress' power was circumscribed because it had previously authorized the Interior Department (in 25 U.S.C. §81, "Contracts with Indian Tribes or Indians") to approve Indian and Native client-arrangements, and plaintiffs' contracts had been so approved.[11] Relying on *Arizona Grocery Co.* v. *Atchison, Topeka and Santa Fe Railway Co.*, 284 U.S. 370 (1932), plaintiffs say that, where Congress' delegate has, prior to performance, regulated and approved (under 25 U.S.C. §81) a contract between an attorney and his client (a contract contemplating recovery from federal funds), the Congress cannot subsequently, after performance, abrogate or restrict the attorney's "vested" contractual rights – at least without paying just compensation.

Though plaintiffs may be right that no previous fee-limitations case involved prior governmental approval of the fee arrangement, this difference is not significant. As the Supreme Court specifically said in *Calhoun* v. *Massie, supra*, 253 U.S. at 176, parties to such fee contracts must know that Congress could later impose limitations, and had often done so. Nothing in 25 U.S.C. §81 or in Interior approval (actual or presumed) of plaintiffs' contracts indicates that Congress could not thereafter exercise that traditional power to restrict legal fees payable with respect to awards or grants of federal monies. When Congress – beginning in the early 1870s – passed the various versions of what is now §81

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[10] Plaintiffs cite *United Mine Workers of America* v. *Illinois State Bar Association*, 389 U.S. 217 (1967) (and earlier decisions in the same line), but there the Court found that the substantial impairment of First Amendment rights definitely outweighed the remote possibility of the harm sought to be prevented by those particular restrictions.

[11] Defendant admits only that three of the Jackson-Fenton contracts were so approved, but we have assumed *arguendo* (see Part I, *supra*) that all of plaintiffs' pertinent contracts were so approved, in actuality or in legal effect.

(requiring executive approval of Indian contracts), it did not constitutionally bar itself from later enacting the fee limitations it subsequently considered desirable in particular or a class of situations. Executive approval under §81 was to be a first screen for possible abuses, not a grant of complete and vested rights to the attorney.

The only decision plaintiffs cite for their novel position is *Arizona Grocery Co.*, which was quite different. The Court there held that, under the statutes then binding the Interstate Commerce Commission, that agency could not reduce, in a reparations proceeding, a rate it had previously promulgated as reasonable, lawful, and legal.[12] The decision had no constitutional overtones at all, and rested wholly on the Court's construction of the then governing Congressional legislation dealing with the ICC. *See* 284 U.S. at 381, 383, 390. Plaintiffs mistakenly see the *Arizona Grocery* opinion as concerned with "vested" rights immune to later change by Congress itself. Instead, the case involved only the power Congress had itself given to the Commission.

The result is that, in our view, sections 20 and 22 of the Settlement Act were valid statutory provisions, supported by established legislative practice and several controlling decisions of the highest court. The converse is that plaintiffs had no "vested" interest in their original fee-arrangements of a type that could be "taken" only on payment of just compensation. *See, e.g., Agins* v. *Tiburon*, 447 U.S. 255 (1980).

V

The third error in plaintiffs' position is that there is no ground for reading into the Settlement Act an eminent domain taking of plaintiffs' pre-existing rights to fees. For such a taking there must be the Congressional purpose or authorization, express or implied, to *take* the property. *See Southern California Financial Corp.* v. *United States*, 225 Ct. Cl. ____, ____, 634 F.2d 521, 523 (1980), *cert. denied*, 451 U.S. 937 (1981). But the Settlement Act does not say or intimate, in any way, that Congress desired to take those rights; nor is any such suggestion in the Act's legislative history. In a word, nothing in the statute or its background sup-

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12 And could not order the excess found in the reparations proceeding to be refunded to the shipper.

ports a taking claim enforceable in this court. Nor is it strange that we find nothing. If, as we have held (in Parts III and IV, *supra*), the fee limitations of sections 20 and 22 must be considered valid, there would obviously be little or no reason for Congress to take plaintiffs' rights by eminent domain (though it could do so if it made that purpose very clear, *see e.g., United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 734-742 (1950)). On the other hand, if the fee limitations are invalid (as plaintiffs strongly argue), Congress, having provided a special mechanism to test the validity of any part of the Act (see Part II, *supra*), is very unlikely to have embedded in the Act, without saying anything, a separate implied taking of plaintiffs' rights as an alternative to outright invalidation of sections 20 and 22. It is very difficult to infer an implied taking from invalid legislation which, by definition, is legislation beyond the authority of Congress to enact. Injunctive and declaratory relief may be available to prevent enforcement of the unconstitutional provisions, but a taking can hardly be found without some good indication that Congress would want that result if its handiwork turned out to be invalid without just compensation being paid. Congress might well be satisfied simply to have the offending provisions cut off and declared unenforceable, without more.

Plaintiffs invoke the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), and *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), as precedents for finding a taking in the Settlement Act. Neither decision is apposite. *Regional Rail Reorganization* involved *an* "erosion taking" (which the Court found a "distinct possibility," 419 U.S. 124) and a possible "conveyance taking" in the course of proceedings mandated by the Regional Rail Reorganization Act of 1973 if a Tucker Act suit for just compensation were unavailable.[13] The court held that the Tucker Act "is available to provide just compensation for any 'erosion taking' effected by the Rail Act" (419 U.S. at 136), as well as for a "conveyance taking" (419 U.S. at 148-56).

The first difference from the present case is that it was probable that the Rail Act would be invalid if the Tucker Act were not triggered by a possible "erosion taking" or "conveyance taking."

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[13] The Rail Act contained no provision for compensation for such "erosion" or "conveyance" takings, and it was argued to the Supreme Court that the heart of the Rail Act was therefore unconstitutional.

See 419 U.S. at 135, 155-56. Here, on the other hand, the Settlement Act was fully valid (as we have shown in Parts III and IV, *supra*) without any provision for compensation greater than plaintiffs have already received. In *Regional Rail Reorganization*, it was therefore probably a prerequisite to the Rail Act's validity to find that just compensation could be had in this court if the feared "erosion" or less-than-adequate "conveyance" occurred; in this case, in contrast, that remedy is wholly unnecessary in order to sustain the Act. Secondly, the *Regional Rail Reorganization* Court believed it very highly probable that Congress, in adopting the Rail Act, wanted to grant the claimant railway the constitutional minimum of just compensation, and that Congress thought that it had done so. *See* 419 U.S. at 128-29, 130-31, 148. Invocation of the Tucker Act remedy would directly foster that prime legislative purpose. In the current cases, on the contrary, it was plainly not at all the Congressional purpose to effect a taking or to grant plaintiffs the full constitutional measure of just compensation for their prior legal work – and it is therefore inconsistent with the Congressional objectives to imply a taking vindicable via the Tucker Act.

There are comparable distinctions from *Dames & Moore, supra*, which upheld the agreement and Executive Orders ending the Iranian hostage crisis, and ruled that, if a constitutional taking occurred through the suspension of claims and receipt from the Iran-United States Claims Tribunal of less than their proper value, this court would be open to the claimants. 453 U.S. at 688-90. That decision held only that, if a constitutional taking actually occurred, the Tucker Act would furnish a remedy.[14] Here, there was certainly no taking if sections 20 and 22 of the Settlement Act were (or are to be considered) valid in themselves,[15] and if those portions of the Act are invalid there is no ground, as we have said, for thinking that Congress wished the Tucker Act to substitute for

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[14] The Court expressly refused to decide whether or not there was a constitutional taking. 453 U.S. at 688-89.

[15] In *Dames & Moore*, the Court held that certain of the President's actions with respect to attachments during the Iranian crisis were valid, and therefore that petitioner did not acquire any "property" interests in its attachments of the sort that would support a constituional claim for compensation. 453 U.S. at 674 n.6. The same is true here if, as we have held, sections 20 and 22 are valid.

an injunction or declaratory judgement ruling the provisions separable and unconstitutional.

CONCLUSION

For these reasons, plaintiffs are not entitled to recover. Their motions for partial summary judgment are denied, the defendant's motion for full summary judgment is granted, and the petitions are dismissed.

CONSTITUTIONAL PROVISIONS

Article I, Section 8

§8. Powers of Congress

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

Article IV, Section 3

§3. Admission of new states; power over territory and other property . . .

The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY & ADMINISTRATIVE PROVISIONS

18 USC §438
Crimes
Indian Contracts for Services Generally

Whoever receives money contrary to section 81 and 82 of Title 25, shall be fined not more than $1,000 or imprisoned not more than six months, or both; and also forfeit the money so received.

25 USC §81
Contracts with Indian tribes or Indians
ACT OF AUGUST 27, 1958
Pub. L. 85-770, 72 Stat. 927

No agreement shall be made by any person with any tribe of Indians, or Individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition consti-

tutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

25 CFR PART 88 – RECOGNITION OF ATTORNEYS AND AGENTS TO REPRESENT CLAIMANTS

§88.1 Employment of attorneys.

(a) Indian tribes organized pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 USC. 461-479), as amended, may employ legal counsel. The choice of counsel and the fixing of fees are subject under 25 USC 476 to the approval of the Secretary of the Interior or his authorized representative.

(b) Attorneys may be employed by Indian tribes not organized under the Act of June 18, 1934, under contracts subject to approval under 25 USC 81 and the Reorganization Plan No. 3 of 1950, 5 USC 481, note, by the Secretary of the Interior or his authorized representative.

(c) Any action of the authorized representative of the Secretary of the Interior which approves, disapproves or conditionally approves a contract pursuant to paragraph (a) or (b) of this section shall be final.

(d) Practice of such attorneys before the Bureau of Indian Affairs and the Department of the Interior is subject to the requirements of 43 CFR 1.1 through 1.7.

25 CFR PART 89 – ATTORNEY CONTRACTS WITH INDIAN TRIBES

TRIBES ORGANIZED UNDER THE INDIAN REORGANIZATION ACT

§89.1 Contracts with organized tribes.

(a) Negotiation and execution of tribal attorney contracts with Indian tribes organized pursuant to the Indian Reorganization Act of June 18, 1934 (48 State. 984; 25 USC 461-479), as amended, shall be in accordance with the provisions of the approved constitution or charter of the respective tribes.

(b) The Secretary of the Interior or his authorized representative is authorized to approve pursuant to 25 USC 476 the selection of counsel and the amount of fees and expenses to be paid under any such contract.

§89.3 Tentative form of contract.

A tribal council or representative body having authority to employ legal counsel in behalf of an organized tribe, may, if it desires, obtain a tentative form of contract by written request directed to the office of any area director or agency superintendent, or to the Commissioner of Indian Affairs. Requests for forms should include a statement of the scope of the intended employment; that is, whether an attorney is desired for investigation and prosecution of tribal claims against the United States, or as a general legal counsel in connection with the ordinary business of the tribe, or specific problems on which legal advice is desired, or specific matters requiring representation in court of before committees of Congress and the departments of the Government. The period for which an attorney is desired should be stated.

§89.4 Report of Superintendant.

Contracts executed by organized tribes should be transmitted to the Area Director by the Superintendant, with a report based upon references and independent inquiry concerning the qualifications of the attorney and his ability to perform the services required by the contract, and

including the superintendant's recommendation with reference to approval of the contract.

TRIBES NOT ORGANIZED UNDER THE INDIAN ORGANIZATION ACT

§89.7 Statutes governing.

The negotiation and execution of tribal attorney contracts with tribes not organized under the Indian Reorganization Act must be in strict accordance with the requirements of section 2103 of the Revised Statutes of the United States (25 USC 81).

§89.16 Notice from the tribe.

Notice of intention to negotiate with attorneys should be sent to the superintendant by the proper tribal officers accompanied by a full statement concerning the need for retailing counsel, showing in detail the purposes for which an attorney is needed, the scope of his intended employment, and a reference to the tribal funds, if any, which the tribe believes should be made available for payment of counsel fees and expenses. The notice and statement should be transmitted to the Area Director by the Superintendant with the latter's report and recommendations.

§89.17 Notice from attorneys.

Attorneys desiring to execute contracts with Indian tribes shall be required to give written notice directed through the superintendant to the Area Director in advance of all negotiations.

§89.18 Tentative form of contract.

A tentative form of contract may be obtained from any agency office, area office, or the Commissioner of Indian Affairs. When the attorney or tribe proposing to execute a contract desires to make substantial changes in the tentative form, the proposed changes should be submitted through the superintendant to the Area Director for approval as to form prior to execution of a contract.

§89.22 Qualifications of attorneys.

The person selected as attorney should be a reputable member of the bar, and fully competent to carry the case through the Court of Claims, and to the Supreme Court of the United States, if necessary.

§89.24 Fees and expenses.

Under rulings of the Comptroller General and section 27 of the act of May 18, 1916 (39 Stat. 158; 25 USC 123), tribal funds held in the United States Treasury may not be used for payment of attorney fees and expenses, in the absence of express authorization by Congress. Unless congressional authority has been obtained for the use of tribal funds, the payment of attorney fees and expenses shall be contingent upon a recovery by the Indians in the matters or claims covered in the contract. In case congressional authority has been obtained for the use of tribal funds for attorney fees and expenses, the provisions of the contract concerning the payment of such fees and expenses should strictly conform to the provisions of the act authorizing the use of the funds.

ALASKA NATIVE CLAIMS SETTLEMENT ACT
Pub. L. 92-203, December 18, 1971, 85 Stat. 88
43 USC §1609

Section 10. Limitation of Actions

Complaint, time for filing; jurisdiction; commencement by State official; certainty and finality of vested rights, titles, and interests

(a) Notwithstanding any other provision of law, any civil action to contest the authority of the United States to legislate on the subject matter or the legality of this chapter shall be barred unless the complaint is filed within one year of December 18, 1971, and no such action shall be entertained unless it is commenced by a duly authorized official of the State. Exclusive jurisdiction over such action is hereby vested in the United States District Court for the District of Alaska. The purpose of this limitation on suits is to insure that, after the expiration of a reasonable period of time, the right, title, and interest of the United States, the Natives, and the State of Alaska will vest with certainty and finality and may be

relied upon by all other persons in their relations with the State, the Natives, and the United States.

Land selection; suspension and extension of rights

(b) In the event that the State initiates litigation or voluntarily becomes a party to litigation to contest the authority of the United States to legislate on the subject matter or the legality of this chapter, all rights of land selection granted to the State by the Alaska Statehood Act shall be suspended as to any public lands which are determined by the Secretary to be potentially valuable for mineral development, timber, or other commercial purposes, and no selections shall be made, no tentative approvals shall be granted, and no patents shall be issued for such lands during the pendency of such litigation. In the event of such suspension, the State's right of land selection pursuant to section 6 of the Alaska Statehood Act shall be extended for a period of time equal to the period of time the selection right was suspended.

43 USC §1619

Section 20. Attorney and Consultant Fees

Holding moneys in Fund for authorized payments

(a) The Secretary of the Treasury shall hold in the Alaska Native Fund, from the appropriation made pursuant to section 1605 of this title for the second fiscal year, moneys sufficient to make the payments authorized by this section.

Claims; submission

(b) A claim for attorney and consultant fees and out-of-pocket expenses may be submitted to the Chief Commissioner of the United States Court of Claims for services rendered before December 18, 1971, to any Native tribe, band, group, village, or association in connection with:

(1) the preparation of this chapter and previously proposed Federal legislation to settle Native claims based on aboriginal title, and

(2) the actual prosecution pursuant to an authorized contract or a cause of action based upon a claim pending before any Federal or State Court or the Indians Claims Commission that is dismissed pursuant to this chapter.

Same; filing date; form; information

(c) A claim under this section must be filed with the clerk of the Court of Claims within one year from December 18, 1971, and shall be in such form and contain such information as the Chief Commissioner shall prescribe. Claims not so filed shall be forever barred.

Same; rules for receipt, determination, and settlement

(d) The Chief Commissioner or his delegate is authorized to receive, determine, and settle such claims in accordance with the following rules:

(1) No claim shall be allowed if the claimant has otherwise been reimbursed.

(2) The amount allowed for services shall be based on the nature of the service rendered, the time and labor required, the need for providing the service, whether the service was intended to be a voluntary public service or compensable, the existence of a bona fide attorney-client relationship with an identified client, and the relationship of the service rendered to the enactment of proposed legislation. The amount allowed shall not be controlled by any hourly charge customarily charged by the claimant.

(3) The amount allowed for out-of-pocket expenses shall not include office overhead, and shall be limited to expenses that were necessary, reasonable, unreimbursed and actually incurred.

(4) The amounts allowed for services rendered shall not exceed in the aggregate $2,000,000, of which not more than $100,000 shall be available for the payment of consultants' fees. If the approved claims exceed the aggregate amounts allowable, the Chief Commissioner shall authorize payment of the claims on a pro rata basis.

(5) Upon the filing of a claim, the clerk of the Court of Claims shall forward a copy of such claims to the individuals or entities on whose behalf services were rendered or fees and expenses were allegedly incurred, as shown by the pleadings, to the Attorney General of the United States, to the Attorney General of the State of Alaska, to the Secretary of the Interior, and to any other person who appears to have an interest in the claim, and shall give such persons ninety days within which to file an answer contesting the claim.

(6) The Chief Commissioner may designate a trial commissioner for any claim made under this section and a panel of three commissioners of the court to serve as a reviewing body. One member of the review panel shall be designated as presiding commissioner of the panel.

(7) Proceedings in all claims shall be pursuant to rules and orders prescribed for the purpose by the Chief Commissioner who is hereby authorized and directed to require the application of the pertinent rules of practice of the Court of Claims insofar as feasible. Claimants may appear before a trial commissioner in person or by attorney, and may produce evidence and examine witnesses. In the discretion of the Chief Commissioner or his designate, hearings may be held in the localities where the claimants reside if convenience so demands.

(8) Each trial commissioner and each review panel shall have authority to do and perform any acts which may be necessary or proper for the efficient performance of their duties, and shall have the power of subpena, the power to order audit of books and records, and the power to administer oaths and affirmations. Any sanction authorized by the rules of practice of the Court of Claims, except contempt, may be imposed on any claimant, witness, or attorney by the trial commissioner, review panel, or Chief Commissioner. None of the the rules, regulations, rulings, findings, or conclusions authorized by this section shall be subject to judicial review.

(9) The findings and conclusions of the trial commissioner shall be submitted by him, together with the record in the case, to the review panel of commissioners for review by it pursuant to such rules as may be provided for the purpose, which shall include provisions for submitting the decision of the trial commissioner to the claimant and any party contesting the claim for consideration, exception, and argument before the panel. The panel, by majority vote, shall adopt or modify the findings or the conclusions of the trial commissioner.

(10) The Court of Claims is hereby authorized and directed, under such conditions as it may prescribe, to provide the facilities and services of the office of the clerk of the court of the filing, processing, hearing, and dispatch of claims made pursuant to this section and to include within its annual appropriations the costs

thereof and other costs of administration, including (but without limitation to the items herein listed) the salaries and traveling expenses of its auditors and the commissioners serving as trial commissioners and panel members, mailing and service of process, necessary physical facilities, equipment, and supplies, and personnel (including secretaries, reporters, auditors, and law clerks).

Report to Congress; payment of claims; interest restriction

(e) The Chief Commissioner shall certify to the Secretary of the Treasury, and report to the Congress the amount of each claim allowed and the name and address of the claimant. The Secretary of the Treasury shall pay to such person from the Alaska Native Fund the amounts certified. No award under this section shall bear interest.

Contract restriction; penalty

(f) (1) No remuneration on account of any services or expenses for which a claim is made or could be made pursuant to this section shall be received by any person for such services and expenses in addition to the amount paid in accordance with this section, and any contract or agreement to the contrary shall be void.

(2) Any person who receives, and any corporation or association official who pays, on account of such services and expenses, any remuneration in addition to the amount allowed in accordance with this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than twelve months, or both.

Claims for costs in performance of certain services: submission, form, information, reasonableness, pro rata reductions; report to Congress; payment of claims; interest restriction

(g) A claim for actual costs incurred in filing protests, preserving land claims, advancing land claims settlement legislation, and presenting testimony to the Congress on proposed Native land claims may be submitted to the Chief Commissioner of the Court of Claims by any bona fide association of Natives. The claim must be submitted within six months from December 18, 1971, and shall be in such form and contain such information as the Chief Commissioner shall prescribe. The Chief Commissioner shall allow

such amounts as he determines are reasonable, but he shall allow no amount for attorney and consultant fees and expenses which shall be compensable solely under subsection (b) through (e) of this section. If approved claims under this subsection aggregate more than $600,000 each claim shall be reduced on a pro-rata basis. The Chief Commissioner shall certify to the Secretary of the Treasury, and report to the Congress, the amount of each claim allowed and the name and address of the claimant. The Secretary of the Treasury shall pay to such claimant from the Alaska Native Fund the amount certified. No award under this subsection shall bear interest.

43 USC §1621

Section 22(a). Miscellaneous Provisions

Contract restrictions; percentage fee; enforcement liens, executions, or judgments

(a) None of the revenues granted by section 1605 of this title and none of the lands granted by this chapter to the Regional and Village Corporation and to Native groups and individuals shall be subject to any contract which is based on a percentage fee of the value of all or some portion of the settlement granted by this chapter. Any such contract shall not be enforceable against any Native as defined by this chapter or any Regional or Village Corporation and the revenues and lands granted by this chapter shall not be subject to lien, execution or judgment to fulfill such a contract.

CLAIMS ATTORNEY CONTRACT

THIS AGREEMENT, made and entered into this 24th day of August, 1966, and reaffirmed this 20th day of November, 1967, by and between the Arctic Slope Native Association of Alaska composed of the Inuit natives (commonly called Eskimos), inhabiting the Arctic Slope of Alaska, including the constituent bands thereof, hereinafter referred to as the TRIBE, and Frederick Paul, attorney at law, hereinafter referred to as the ATTORNEY:

WITNESSETH: That the TRIBE under the authority vested therein by resolution of a council of the TRIBE adopted on the 24th day of August, 1966, and reaffirmed on the 20th day of November, 1967, copies of which are hereunto attached and made a

part hereof, hereby contracts with, retains and employs the ATTORNEY in the matters hereinafter mentioned, subject to the approval of the Secretary of the Interior or his authorized representative.

It shall be the duty of the ATTORNEY to advise and represent the TRIBE in connection with properly investigating and formulating the claims of the TRIBE against the United States or such other parties as they may feel are appropriate to a favorable determination of the TRIBE's claims.

It shall be the duty of the ATTORNEY to advise the TRIBE and to represent it before all courts, departments, tribunals, the Committees of Congress, and other officers having any duty to perform in connection with the investigation, consideration, and final settlement of claims.

The ATTORNEY in performance of the duties required of him under this contract shall be subject to the supervision and direction of the TRIBE, provided that any compromise or settlement of the matters in controversy shall be subject to the approval of both the TRIBE and the Secretary of the Interior or his authorized representative.

It is agreed that the ATTORNEY, subject to the approval of the Secretary of the Interior or his authorized representative, may associate with him in work under this contract such attorney or attorneys as he may select; PROVIDED, That neither the TRIBE nor the Government is to be at any expense by reason of the aforesaid employment of such associate attorney, all compensation thereof to be paid by the ATTORNEY out of any compensation which he may receive for his services: PROVIDED, however, if the TRIBE does have funds on hand, it may reimburse said ATTORNEY for actual costs and expenses from time to time, after approval of said expenses by the Secretary of the Interior or his authorized representative.

It is agreed that the compensation of the ATTORNEY from the TRIBE for the services to be rendered under the terms of this contract *is to be wholly* contingent upon a recovery of money or property or both for the TRIBE. The ATTORNEY shall receive such attorney's fees and expenses as the court or tribunal awarding a recovery of property or money to the TRIBE shall determine to be equitably due the ATTORNEY or, if the matter be settled

without submission to a court or tribunal resulting in a recovery of property or money for the TRIBE, as the Secretary of the Interior or his authorized representative may find to be equitably due the ATTORNEY. It is specifically understood that the ATTORNEY may seek the aid of Foundations and other interested groups in the underwriting of the fees and expenses of the ATTORNEY: PROVIDED that out of the recovery of money or property or both, it is agreed that in no event shall the aggregate fee awarded the ATTORNEY exceed ten percent (10%) of any and all sums or property recovered or procured or recognized through the efforts, in whole or in part, of the ATTORNEY for the TRIBE, whether by suit, *action* of any department of the government or *of the Congress* of the United States, or otherwise: PROVIDED further that any grants or funds made available to the ATTORNEY shall be considered in determining the compensation due to the ATTORNEY: and it is further PROVIDED that, in the event of recovery of property only, the fee paid to the ATTORNEY shall be paid on a prorated basis of income derived from said land until such time as the fee is paid in full.

It is further agreed that this contract shall continue for a period of ten years upon its approval by the Secretary of the Interior or his authorized representative.

It is also agreed that no assignment of the obligations of this contract, in whole or in part, shall be made without the consent, previously obtained, of the TRIBE and the Secretary of the Interior or his authorized representative.

It is further agreed that no assignment or encumbrance of any interest of the ATTORNEY in the compensation agreed to be paid by this contract shall be made without the approval of the Secretary of the Interior or his authorized representative; PROVIDED, that if any assignment of the obligations of this contract and/or any assignment or encumbrance of any interest in the compensation agreed to be paid is made in violation of the provisions of this paragraph, the contract may be terminated at the option of the Secretary of the Interior or his authorized representative and in such event no attorney having any interest in the contract or in the fee provided for therein shall be entitled to any compensation whatever for any services rendered or expenses incurred subsequent to the date of termination of the contract.

It is agreed that in the event of the death of the ATTORNEY or any of them, the estate of the deceased attorney or the estates of the deceased attorneys, as the case may be, shall be allowed compensation in such sum as the court or tribunal awarding a judgment to the TRIBE may find equitably to be due for services theretofore rendered under the contract or if there be a recovery without submission to a court or tribunal, then in such sum as the Secretary of the Interior or his authorized representative may find equitably to be due.

The death of the ATTORNEY shall terminate this contract unless there is left surviving one attorney or more who is a party to this contract or who holds an interest therein under an assignment approved by the Tribal Council, and by the Secretary of the Interior or his authorized representative, in which event such surviving attorney or attorneys shall serve as the ATTORNEY under this contract until it expires or is terminated in accordance with the terms hereof.

This contract may be terminated by the Secretary of the Interior or his authorized representative with the consent of the TRIBE for cause deemed by the Secretary of the Interior or his authorized representative to be reasonable and satisfactory upon sixty (60) days notice to the parties in interest; and, if the contract shall be so terminated, the ATTORNEY shall be credited with such share in the attorney fee as the court or tribunal may determine to be equitable upon the final determination of the said suit and the controverted matters therein included in such a manner as to result in a recovery for the TRIBE; PROVIDED, that if a recovery for the TRIBE be had without submission to a court or tribunal, then the ATTORNEY shall receive such compensation as the Secretary of the Interior or his authorized representative may determine equitably to be due.

The ATTORNEY shall submit not less frequently than semiannually to the Secretary of the Interior or his authorized representative and the TRIBE a report of the services rendered to the TRIBE for the past six (6) months period.

IN WITNESS WHEREOF, we have hereunto set our hands this 24th day of August, 1966, at Barrow, Alaska, and reaffirmed this 20th day of November, 1967.

ARCTIC SLOPE NATIVE ASSOCIATION

BY: /s/ WALTON AHMADGAK
PRESIDENT

BY: /s/ HUGH NICHOLLS
VICE PRESIDENT

/s/ FREDERICK PAUL
ATTORNEY

Approved under authority delegated
to the Area Director on November 24, 1962:
/s/ R. E. McLEAN
ACTING AREA DIRECTOR

Date: January 8th, 1968

RESOLVED: That Hugh Nicholls, James Leavett, and Eben Hopson, members of the Tribe be, and they were thereupon, selected as delegates to reaffirm said Claims Attorney Contract, which was originally executed August 24, 1966, for and on behalf of said Tribe.

/s/ WALTON AHMADGAK

PRESIDENT OF THE COUNCIL

ATTEST:

/s/ HUGH NICHOLLS

1ST VICE PRESIDENT

STATE OF ALASKA)
) ss
Bond Judicial District)

On this 21st day of November, 1967, before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned and sworn, personally appeared Walton Ahmaogak and Hugh Nicholls, to me known to be the President and Secretary, respectively, of the ARCTIC SLOPE NATIVE ASSOCIATION, the association that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said association, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute said instrument.

WITNESS my hand and official seal hereto affixed the day and year first above written.

(seal)

/s/ IRENE DOW

NOTARY PUBLIC in and for the State of Alaska, Residing at Anchorage

I hereby certify that the foregoing Resolution was regularly adopted by the ARCTIC SLOPE NATIVE ASSOCIATION OF Inuits (commonly called Eskimos) on the 21st day of November, 1967, A.D., after full and free discussion of the merits of the attorneys and the delegates.

/s/ WALLACE CRAIG, SUPERINTENDENT

Authorized Agent of the
Bureau of Indian Affairs.

No. 82-1215

In the Supreme Court of the United States

OCTOBER TERM, 1982

FREDERICK PAUL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

DAVID C. SHILTON
BLAKE A. WATSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the fee limitation provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. 1619 and 1621(a), constitute a "taking" of petitioners' right to collect additional fees and hence are unconstitutional unless just compensation is paid.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. a1-a12) is reported at 687 F.2d 364.

JURISDICTION

The judgment of the Court of Claims was entered on August 25, 1982 (Pet. App. a1). On November 16, 1982, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 20, 1983. The petition was filed on January 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1]28 U.S.C. 1255 was repealed effective October 1, 1982, by Sections 123 and 402 of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 36, 57. Although the judgment of the Court of Claims was rendered prior to that date, the petition was not filed until

STATEMENT

1. Petitioners are attorneys who signed contracts between 1965 and 1971 with several Alaska Native groups and entities to render professional services with regard to the Natives' aboriginal land claims. The contracts were largely identical and stated that compensation was "to be wholly contingent upon a recovery of money or property or both" in the amount "equitably due" the attorney as determined by "the court or tribunal awarding [the] recovery of property or money" (Pet. App. a24). The compensation clause, which encompassed the recovery of money or property by virtue of action by Congress, specified that the attorney's fee was not to exceed 10% of the recovery (*id.* at a25). Petitioners sought to have their contracts approved by the Secretary of the Interior pursuant to 25 U.S.C. 81.[2] Whether these contracts were in fact approved by the Secretary pursuant to 25 U.S.C. 81 is disputed in most instances; the Court of Claims assumed without deciding, however, that all the contracts were approved by the Secretary (Pet. App. a2).[3]

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after Section 1255 had been repealed. In addition, none of the provisions of Section 403 of the Federal Courts Improvement Act, which governs the transfer of pending cases from the Court of Claims, appears to address the availability of certiorari review of cases decided prior to October 1, 1982, but not filed in this Court until after that date. Nevertheless, we assume that for purposes of certiorari review this case may be deemed to have been automatically transferred to the new Federal Circuit on October 1, 1982, and that the jurisdiction of this Court may therefore properly be invoked under 28 U.S.C. 1254(1).

[2]25 U.S.C. 81 provides that "[n]o agreement shall be made by any person with any tribe or Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money * * * unless such contract or agreement * * * shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it."

[3]It is the government's position that none of petitioner Paul's contracts was approved pursuant to 25 U.S.C. 81. In particular, the United States contends that Paul's contract with the Arctic Slope Native Association (ASNA) did not require approval because 25 U.S.C. 81 applies

2. In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, under which the Alaska Natives received large amounts of money and property in settlement of their aboriginal land claims. The question of attorneys' fees was addressed by Congress both in Section 20 (43 U.S.C. 1619) and in Section 22(a) (43 U.S.C. 1621(a)) of the Act. Section 22(a) (reprinted at Pet. App. a23) voided all contracts that provided as a fee a percentage of the value of any portion of the legislative settlement. Section 20 (reprinted at Pet. App. a19-a23) set up an alternative procedure for payment of claims for fees and expenses for certain specified services, including services rendered in connection with the preparation of ANCSA and previous proposed settlement legislation. Congress restricted the total amount to be paid out under this section to attorneys to $1.9 million, further providing that payment would be on a pro rata basis if approved claims exceeded this aggregate limitation. 43 U.S.C. 1619(d)(4). The statute provided that claims would have to be submitted to the Chief Commissioner of the United States Court of Claims by December 18, 1972, or else they would be barred. 43 U.S.C. 1619(c). Review of claims determinations could be had before a review panel designated by the Chief Commissioner, but any other judicial review was prohibited. 43 U.S.C.

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only to contracts with tribal entities and ASNA is not recognized as a tribal entity. In light of this fact, the Secretary informed Paul on December 12, 1968, that the January 8, 1968 approval of the ASNA contract by the Acting Area Director of the Bureau of Indian Affairs, whose authority did not extend to determining whether ASNA was a tribal entity, was not required by 25 U.S.C. 81 and neither added to nor detracted from the contract. Upon the suggestion of the Secretary, petitioner Paul thereafter entered into seven contracts with the separate villages which made up ASNA. These contracts, however, were disapproved by the Secretary because they included a fee percentage arrangement rather than an hourly fee. The Secretary did approve in June 1968 contracts entered into with three Alaskan villages by petitioners Jackson and Fenton. Other contracts entered into by Jackson and Fenton either were disapproved or were never submitted for approval.

1619(d)(6) and (8). Finally, the statute declared it to be a misdemeanor to pay or receive any additional remuneration for services compensable under the Act, and it voided all contracts to the contrary. 43 U.S.C. 1619(f).

3. Petitioners filed claims with the Chief Commissioner and, in December 1974, signed a stipulation regarding the amount of compensation each would receive. Under the stipulation, signed by all claiming attorneys, payment was made on a pro rata basis, with the law firm of petitioner Paul receiving $697,000 (Paul receiving $276,000 personally) and petitioners Jackson and Fenton receiving $130,082 (Pet. App. a3).

Petitioners then sought to recover additional compensation by litigation. Petitioner Paul filed a breach of contract action in the United States District Court for the Western District of Washington in June 1976, seeking further compensation for services covered under ANCSA (and a declaration that Sections 20 and 22(a) of ANCSA were unconstitutional) as well as for services not covered by ANCSA (Pet. App. a4).[4] The district court, in an unreported decision, ruled that it had no jurisdiction because of Section 10(a) of ANCSA, 43 U.S.C. 1609(a), which provides that suits challenging the legality of the Act had to be commenced before December 18, 1972, by an authorized official of the State of Alaska in the United States District Court for the District of Alaska. In *Paul* v. *Andrus*, 639 F.2d 507 (1980), the Ninth Circuit affirmed on the basis that the time and venue restrictions of the statute were valid and barred the suit. Petitioners Jackson and Fenton filed a different suit in December 1977 in the United States District Court for the District of Alaska seeking similar relief. The district court denied relief

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[4]The action named as defendants several federal officials, 12 of the regional corporations organized under ANCSA, and the parties to petitioner Paul's employment contracts.

on a number of grounds (*Jackson* v. *United States*, 485 F. Supp. 1243 (D. Alaska 1980)), and the Ninth Circuit granted petitioners' motion to dismiss their appeal in light of *Paul* v. *Andrus, supra*. See Pet. App. a4.

4. The instant suits were reactivated in the Court of Claims following the resolution of *Paul* v. *Andrus*. Petitioners alleged for the first time in these actions that the limitation placed on attorney compensation by ANCSA, if valid, constituted a taking of vested contract rights that required just compensation. In particular, petitioners argued that (1) their employment contracts were approved by the Secretary pursuant to 25 U.S.C. 81; (2) the contractual rights became vested property rights after performance; and (3) because the contracts were approved pursuant to congressionally delegated authority, Congress could not thereafter abrogate or restrict the vested contractual rights without paying just compensation. Petitioners also contended that Sections 20 and 22(a) of ANCSA significantly impaired the First Amendment right of Alaska Natives to utilize legal counsel to petition the government for a redress of grievances. Because First Amendment rights were affected, petitioners contended, the attorney compensation sections could be justified only on the basis of a "clear and present danger."

The Court of Claims granted the government's motion for summary judgment and dismissed both petitions (Pet. App. a1-a12). The Court of Claims found three distinct defects in petitioners' position. First, the court held that *Paul* v. *Andrus, supra*, precluded petitioners from challenging the constitutionality of Sections 20 and 22(a) of ANCSA, both because that case was res judicata and because it correctly held that such a challenge could only be brought in accordance with the time and venue limitations of 43 U.S.C. 1609(a) (Pet. App. a4-a6). Second, the court held that, in any event, petitioners' challenge was without

merit because this Court repeatedly has upheld legislation "limiting an attorney's share of the funds he helped to procure from the Federal Government, despite a contract he may have, or have had, with the client for whom he obtained the federal money" (*id.* at a6). The Court of Claims found these decisions controlling here, and it rejected as an insufficient ground for distinguishing them the contention that this case has special First Amendment overtones because the petitioners were employed by the Alaska Natives in order to petition the government for a redress of their grievances (*id.* at a7-a8).[5] Likewise, the court held that the Secretary's approval of the attorney contracts, which it assumed arguendo to be a fact (see *id.* at a2), was not significant in that 25 U.S.C. 81 did not purport to prevent Congress from limiting legal fees associated with grants of federal monies (*id.* at a8-a9).

Finally, the court held that nothing in ANCSA or its legislative history supported a finding of a congressional purpose or authorization to take property by eminent domain. If petitioners' argument were correct that the fee limitations constituted a taking, the court explained, Congress' intent would likely have been that the provisions be declared unenforceable, and thus, in any event, the court held that there was no damage claim cognizable in the Court of Claims (Pet. App. a9-a12).

ARGUMENT

Petitioners contend (Pet. 7-21) that the Just Compensation Clause of the Fifth Amendment requires that the government pay them for legal services rendered to Alaska

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[5]The Court of Claims found the connection between the attorneys' fee provisions and the Alaska Natives' First Amendment rights to be "tenuous at best," noting that Sections 20 and 22(a) of ANCSA did not directly restrain any First Amendment rights of the Natives (or their attorneys). Moreover, the Act did not even constitute an indirect restraint, since the provisions were not enacted until after the rights were exercised. See Pet. App. a7-a8.

Native groups to the extent payment is not provided by ANCSA. This contention is wholly without merit and does not warrant review by this Court.

1. At the outset, we note that the Court of Claims correctly held that petitioners are precluded from challenging the constitutionality of ANCSA in this proceeding . See Pet. App. a4-a6. Section 10(a) of the Act, 43 U.S.C. 1609(a), requires that challenges to its legality be made in the District of Alaska within one year of the effective date of the Act. And the Ninth Circuit has already held in a case that is binding on petitioners here that their failure to comply with this provision bars their constitutional claims to additional attorneys' fees. *Paul* v. *Andrus*, 639 F.2d 507 (1980). Petitioners' claim that ANCSA's fee limitation violates the First Amendment (Pet. 7-11) therefore manifestly is barred. Moreover, petitioners' Fifth Amendment claim for additional compensation is also barred. Petitioners do not contend that Congress intended to pay them the compensation they seek here; such a claim would be patently frivolous in light of the explicit fee limitation of the Act. See Pet. App. a10. Rather, petitioners' argument is that ANCSA's fee limitation is an unconstitutional taking unless they receive the additional compensation they seek here. This is fundamentally a claim of unconstitutionality, and hence, contrary to petitioners' assertion (Pet. 19 n.10), it is also barred under Section 10(a) and *Paul* v. *Andrus, supra.*

2. a. In any event, the Court of Claims correctly rejected petitioners' claims on the merits. As the court explained (Pet. App. a6-a7), and, indeed, as petitioners concede (Pet. 14-19), there is a consistent line of decisions of this Court upholding limitations on an attorney's share of the funds he helped to procure from the government, notwithstanding the provisions of a private contract between the attorney and the client. See, *e.g., Hines* v. *Lowrey*, 305 U.S. 85, 91 (1938); *Calhoun* v. *Massie*, 253 U.S. 170, 173-177 (1920);

Capital Trust Co. v. *Calhoun*, 250 U.S. 208, 213-220 (1919). As the Court of Claims explained (Pet. App. a6):

> The core reasons for the validity and retroactive application of such provisions are that (a) the payment of federal funds cannot be made without legislation consenting to suit against the United States or authorizing the payment of federal money to the claimants, (b) Congress has the authority to mold and limit its consent to suit and its award of monies, and (c) in making attorney or client contracts the parties must be aware, particularly in view of much past practice (now well over a century old), that Congress could be "unwilling to enact any legislation without assuring itself that the benefits thereof would not inure largely to others than those named in the act." *Calhoun* v. *Massie*, *supra*, 253 U.S. at 176-77.

These principles are fully applicable here. The payments made under ANCSA were pursuant to Congress' powers under the Property Clause, Article IV, Section 3, and the Indian Commerce Clause, Article I, Section 8, and Congress plainly was authorized to make certain that these payments went only to the proper beneficiaries and, to that end, to limit the recovery of attorneys' fees from those payments. Indeed, Congress noted that the purpose of the fee limitation was "to protect the Native people." H.R. Conf. Rep. No. 92-746, 92d Cong., 1st Sess. 47 (1971). Any rights created by petitioners' contracts were subject ab initio to the power of Congress to invalidate contractual provisions that interfere with the legitimate exercise of its constitutional authority. See *Norman* v. *Baltimore & O. R.R.*, 294 U.S. 240, 309-310 (1935). Petitioners could not create by contract a vested property right to any portion of the revenues provided in ANCSA beyond those subsequently set aside by Congress for the payment of attorneys' fees. Accordingly, the fee limitation of the statute did not "take" any property rights.

b. Petitioners' attempted distinctions are unavailing. The first contention (Pet. 7-11) is that this case raises special First Amendment concerns because the legal representation here was to petition the government for a redress of the Alaska Natives' grievances; hence, according to petitioners, the fee limitation could be imposed only to meet a "clear and present danger."

As noted by the Court of Claims (Pet. App. a7), the connection between the fee limitation provisions of the Act and the First Amendment rights of the Alaska Natives is "tenuous at best," particularly in light of the fact that the activities supposedly affected occurred before the passage of the Act. Moreover, the notion that a fee limitation of $1.9 million will discourage legal representation in the future, which underlies petitioners' claim, assumes a minimum level of acceptable attorney compensation that is hardly self-evident. In any event, the fact that this case involves legal representation to petition Congress does not distinguish it from earlier congressional enactments. *Calhoun* v. *Massie*, *supra*, involved the fee claim of an attorney hired to prosecute a claim against the government for property taken during the Civil War. See 253 U.S. at 172-173. See also Pet. App. a8, citing the Indian Claims Commission Act, 25 U.S.C. 70n. The fee limitation here was enacted precisely to protect the rights of the Alaska Natives and to prevent them from being diminished by excessive attorneys' fee contracts.

c. Petitioners also contend (Pet. 12-19) that this case is different because the Secretary's approval of the contracts pursuant to 25 U.S.C. 81 transformed them into vested property rights protected by the Takings Clause. Assuming arguendo that these contracts were so approved (but see note 2, *supra*), that approval did not interpose a constitutional bar to Congress' enactment of the fee limitation.

Petitioners rely chiefly on this Court's decision in *Arizona Grocery Co.* v. *Atchison, T. S. F. Ry.*, 284 U.S. 370 (1932). Recognizing that *Arizona Grocery* rested entirely upon a statutory interpretation of the Interstate Commerce Act of 1887 and its progeny, petitioners argue (Pet. 12) that "it is time for the Court to denominate the rule enunciated in *Arizona Grocery* * * * as a constitutional principle." In *Arizona Grocery*, this Court simply held that, as a matter of statutory construction, once the ICC, after a hearing, had declared a particular rate to be reasonable, the Commission could not later order the payment of reparations to shippers for shipments made at that rate on the ground that a lower rate should have been charged. That decision is inapposite here.[6] It nowhere suggests that an executive official's approval of a contract acts to prevent Congress from imposing appropriate limitations on its disbursements of funds, even if those limitations diminish the rights of private parties under the contract.

By the same token, nothing in 25 U.S.C. 81 suggests that the parties to a contract approved thereunder are entitled to assume that Congress will not act in a manner that affects the rights under the contract (cf. Pet. 18), particularly when the congressional action is consistent with a long tradition of limiting fees. See Pet. App. a6. The fact that approval by the Secretary is a precondition to the enforceability of the contract does not mean that the approval itself validates a contract that is unenforceable for other reasons. As the

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[6]Similarly, the other cases cited by petitioners (Pet. 17-18) are inapposite. *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937), concerned property rights of Indians recognized by treaty or otherwise and rested in part on the quasi-sovereign status of Indian Tribes. Indeed, the fact of liability was not in issue in that case, only the measure of compensation. And, as petitioners themselves note (Pet. 18), *Perry* v. *United States*, 294 U.S. 330 (1935), expressly stated that it concerned only government contracts, not contracts between private parties.

Court of Claims stated (Pet. App. a9), approval under 25 U.S.C. 81 was intended to be "a first screen for possible abuses, not a grant of complete and vested rights to the attorney."

3. Finally, the Court of Claims correctly held (Pet. App. a9-a12) that, even if the fee limitation is considered a "taking," petitioners would not be entitled to compensation from the government. ANCSA plainly evinces an intent to limit the legal fees payable out of government funds as a result of this settlement, and there is no reason to suppose that Congress would have wanted to pay additional compensation to the attorneys beyond that specified in the Act. Rather, if the fee limitation were held to be a taking without just compensation, the proper remedy would be simply to strike it down. See *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1983

DOJ-1983-04

No. 82-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FREDERICK PAUL,
Petitioner,
v.
THE UNITED STATES

AND

BARRY JACKSON AND THOMAS FENTON,
Petitioner,
v.
THE UNITED STATES

REPLY BRIEF OF PETITIONERS AND APPENDIX

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May 9, 1983

QUESTIONS PRESENTED: RESTATED

1. Does the voidance by Congress of certain federally approved contract rights for attorneys' fees, which is incidental to its undisputed powers under the Indian Commerce Clause, raise an issue cognizable in the District Court for an injunction or in the Court of Claims for just compensation?

2. Does the invocation of alleged First and Fifth Amendment protections in the regulation of an attorney's fee contract, grounds not previously considered by the Supreme Court in its prior consideration of attorneys fee regulatory cases, justify the grant of certiorari in this proceeding?

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REPLY BRIEF OF PETITIONERS AND APPENDIX

INTRODUCTION

The government's Brief in Opposition raises essentially two points: first, that the Petitioners are barred by §10 of ANCSA and the doctrine of res judicata arising from the companion litigation[1] from challenging the constitutionality of the statute and secondly, that, in all events, the result is correct on the merits as consistent with this court's reasoning under the Calhoun v. Massie, 253 U.S. 170 (1920) line of cases; that the First Amendment connection is "tenuous" at best; and that administrative approval of a contract does not vest future rights in government property or in any manner subvert the Congress' dominant constitutional power under the Indian Commerce and Property Clauses.

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[1] Paul v. Andrus, 639 F 2d 507 (9th Cir., 1980); Jackson and Fenton v. U.S., 485 F.Supp. 1243 (D.C., Alas., 1980).

I. PETITIONERS HAVE NEVER HAD THE REMEDY OF INJUNCTION IN THE DISTRICT COURT AND THUS RELIEF, IF PROPER, IS OBTAINABLE SOLELY UNDER THE TUCKER ACT BEFORE THE COURT OF CLAIMS (NOW CLAIMS COURT OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT).

The government argues that if the voidance of Petitioners' contracts was indeed constitutionally infirm, "the proper remedy would be simply to strike it down". (Brief in Op., p.11) citing Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935). In other words, enjoin §§20 and 22(a). Indeed, Petitioners so attempted but failed, not on the merits of their challenge, but as being out of time under a special statute of limitations, §10 of ANCSA. That litigation, however, never reached the question of the availability of equitable relief, holding §10 barred the action.[2]

[2] The precise holding of the Ninth Circuit in Paul v. Andrus found it necessary to sever a constitutionally offensive portion of §10 from the time and venue provisions of the section to sustain its application to that action. §10 literally barred that action at any time because it limited complainants to "authorized officials of the State of Alaska", which, of course, did not include these Petitioners.

Jurisdiction is, of course, the threshhold question. No matter the gravity of Petitioners' claim, if there be no jurisdiction, there be no power to grant any relief whatsoever. Louisville and Nashville R.R. v. Mottley, 211 U.S. 149 (1908). As far as the government goes, it is correct. However, it misconstrues Radford, supra and totally ignores Hurley v. Kinkaid, 285 U.S. 95 (1932), Duggan v. Rank 372 U.S. 609 (1963), Fresno v. California, 372 U.S. 627 (1963), Dames & Moore v. Regan, 453 U.S. 654 (1981) and most importantly, Shoshone Tribe v. U.S., 299 U.S. 476 (1937).

Radford was an action to, in effect, restrain the enforcement of certain depression occasioned amendments to the Federal Bankruptcy Code which gave secured property to a debtor free of a mortgagee's perfected lien, given certain other prescribed conditions. At issue was whether the bankruptcy power (Art. I, Sec. 8) authorized the Congress to so act; whether, in fact, such was a taking without due process of law and contrary to the Fifth Amendment. The Court, by

Justice Brandeis, held that the bankruptcy power was not so broad. The rationale was that the bankruptcy power was a known quantity with a generally accepted meaning at the time the Constitution was adopted; it was not plenary in scope. That known meaning clearly did not extend to the abrogation of secured property rights. To allow the Congress to so extend the meaning of the bankruptcy power clearly brought it into direct confrontation with the Due Process Clause of the Fifth Amendment. If the national interest required such power,

> "resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public." 295 U.S. at 602.

Here, the power is Indian commerce, an unknown quantity, akin to the foreign policy powers of the United States. These powers of the Congress and the Executive have been classically considered to raise non-justiciable questions, questions best left to the political departments of government. U.S. v. Curtis-Wright Export Corp., 229 U.S. 304 (1926); Dames & Moore v. Regan,

supra; Shoshone Tribe v. U.S., supra.

The issue is, under the Indian Commerce Clause, does Congress have the power to take property rights in the resolution of a major controversy involving aboriginal claims irrespective of what those rights might be. Petitioners maintain yes, it does. It raises questions charged by the Constitution and lawful authority to the political departments of government, unlike under the bankruptcy power. Thus, for Paul v. Andrus, supra to be controlling authority here the Court must be prepared to find that had the case been brought in time, there existed the power to grant relief sought. We submit, as in Dames & Moore, supra, the relief would have been denied, leaving the complainants to seek relief, if any, in the Court of Claims.

The acknowledgement of such power, however, does not reach the issue of just compensation. Though the government may take, it may also have to provide just compensation. So stated this court in Dames & Moore v. Regan, supra and, most importantly, Shoshone Tribe v. U.S.,

supra. In Shoshone Tribe, the United States had allowed the settlement of a band of Paiutes upon Shoshone treaty lands, thus diluting the real value of the reservation to the Shoshones to whom the land belonged. The Court held that the Indian commerce power allowed the Congress to reach so far, even to abrogate treaty rights, if done in "good faith" but

> "The power does not extend so far as to enable the government to give the tribal lands to others, or to appropriate them to its own purposes without rendering or assuming an obligation to render, just compensation. . ." 299 U.S. at 497.

This dichotomy isolates the issue before this Court. ANCSA awarded certain properties and monies to Alaska's Natives in a sum relatively certain. The attorneys' contract rights, if enforced, would in all probability dilute that award and the Congress decided to maximize the economic gain available to the Natives. It cannot be maintained, solely on a property analysis, that such action was not taken in good faith or is not comprehended by the Indian Commerce

Clause.[3]

However, though the government has the power to so act, remaining is the issue of whether or not it can do so without just compensation.

II. THE PRIOR DECISIONS OF THIS COURT ARE INAPPOSITE TO THE CASE AT BAR; THE QUESTIONS PRESENTED RAISE SUBSTANTIAL CONSTITUTIONAL ISSUES RELATIVE TO THE RIGHT TO COUNSEL, RIGHT TO PETITION, AND THE TAKING OF VESTED PROPERTY RIGHTS WITHOUT JUST COMPENSATION.

This case, above all else, is a right to counsel case. Appended hereto at a-1 is a statement of the Honorable Ted Stevens, Senator from Alaska, current Majority Whip of the Senate, a former Solicitor to the Department of the Interior and member of the Conference

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[3] Petitioners do not here advance the proposition that the Indian Commerce Clause is so all encompassing as to preclude injunctive or declaratory relief were the Congress to provide directly for a "prior restraint" or to deny a right to counsel. To the contary, Petitioners limit this posture solely to the power of Congress to take property rights.

Committee which reported the Alaska Native Claims Settlement Act to the full Congress. We believe this statement, combined with the positions advanced by the amici curiae which have appeared in this proceeding, fully demonstrates the severity and the breadth of the questions presented.

Senator Stevens takes great care in pointing out why he believes this case is "of substantial importance for the guidance of Congress and the judiciary". (a-2). He acknowledges the complexity of the issues considered by the Congress encom passed by ANCSA in general, with the concommitant depth of study by the Congress on those issues, in marked contrast to the consideration it gave to attorneys and their fees.

> "I hesitate to say we acted arbitrarily, but Congress gave little thought to this important matter." (a-5).

Pointedly and poignantly, he concludes his statement with the observation:

> "I do have great difficulty with §20 and §22(a) of ANCSA because they not only raise constitutional problems with respect to your claims, but also send a message for the future to other counsel that just compensation for services rendered to Native

> Americans will be denied. In my judgment the Natives of Alaska, for a variety of reasons, were essentially denied the ability to petition the Congress for the better part of one hundred years, not by laws, but in fact.
>
> "Congress should ask what other claims will come before us in the future, and who will be willing to represent those groups financially disadvantaged knowing that their claims for fees can be substantially reduced or voided retroactively? The answer is that few will take up the cause. That is why I believe that Native Americans, as a matter of constitutional intrepretation, should have no less right to effective counsel and advocacy in the petitioning of Congress." (a-6).

Sections 20 and 22(a) of ANCSA must be taken in the context of the regulation of attorneys, broadly speaking, in Indian affairs. The roots of Congress' regulation of attorneys in Indian affairs were born during the height of "manifest destiny" by a Congress in the early 1870's,[4] enormously suspicious of advocates who advanced Native causes, referencing them as a "class of avaricious and unprincipled claim-agents and

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[4] 25 USC §81 Act of March 3, 1871, c 120, Section 3, 16 Stat. 570; Act of May 21, 1872, c.177, Sections 1, 2, 17 Stat. 136.

middlemen"[5] who were "generally bankrupt in morals, religion and politics . . ."[6]

> "These claims . . . need no skilled attorneys or counsel outside of the departments which are able and willing to do justice, without cost to the Indian."[7]

It also ought be noted that prior to 1871, attorneys were totally barred from representing Indians with respect to claims against the government.[8]

This rather ignoble beginning led full circle by 1968 when the Congress adopted Title VI of the Indian Civil Rights Act.[9] Title VI required action by Interior on Section 81 contracts within 90 days of submission and was the product of enormous and frequent delays in the approval of such contracts by Interior

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5 Investigation of Indian Frauds, Report of the Committee on Indian Affairs, Report No. 98 42nd Cong., 3rd Sess., March 3, 1873, at p.2.

6 Id. at p.76.

7 Id. at p.5.

8 Act of March 3, 1853, 10 Stat. 226, 239.

9 25 USC §1331; Pub.L. 90-284, Title VI Section 601, April 11, 1968. 82 Stat. 80.

which, in the words of the Senate Judiciary Committee, had reached a point "tantamount to the denial of due process of law".[10]

In opening the hearings on Title VI, Senator Sam Ervin, Chairman of the Senate Judiciary Committee, observed, in acute contrast to the comments of the 1873 Indian Affairs Committee:

> "Because of the many unique laws affecting them, no group in the United States has had more problems requiring expert legal assistance than the American Indians."

Though the appreciation of Indian needs in legal representation evolved, the statutory regulatory mechanism has not. Other than the 90-day rule of Title VI. §81 has been amended but once since 1872 in a here, immaterial manner.[11]

The issue is of the gravest moment. The contracts here in question related to

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10 Constitutional Rights of the American Indian, Summary Report of Hearings and Investigations by the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, 88th Cong., 2nd Sess., on S.Res.265 (1964).

11 ¶2d Pub.L. 85-770 (1958) deleted requirement of execution before a court of record.

aboriginal claims in public domain lands,[12] lands in which the United States in general and the Department of Interior in particular, had an interest directly contrary to that of the Native claimants -- yet, it is the Secretary of the Interior who is charged with the discretionary authority under §81 to approve the retention and terms of compensation of counsel for the natives -- his adversaries. And yet, it is also this same individual with the fiduciary duty of a trustee to protect the Native position. U.S. v. Kagama, 118 U.S. 375 (1886).

It is an enigma of history, of law of common sense, that such legally sanctioned conflicts should be allowed to stand for such a long period of time. President Nixon, in calling for the creation of the office of "Indian Trust Council", the purpose of which was to remove Indian advocacy from Interior and

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[12] According to Alaska Natives and the Land, Fed. Field Comm. for Development Planning in Alaska, GPO (1968), 358 million of Alaska's 375 million acres were under federal control, 325 million acres of which were subject to Native aboriginal protests (at p. 453), eighty-seven percent of the entire state.

Justice, acknowledged the conflict,[13] as did Secretary of the Interior Rogers Morton[14] and Attorney General John Mitchell [15].

Despite extensive hearings on the issue,[16] however, nothing has changed. The effect of this reality is that Interior continues to fail to protect and advance the Native cause, further demonstrating the compelling need for counsel of the highest ability. See e.g. Edwardsen v. Morton, 369 F Supp. 1359

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13 "Recommendations for Indian Policy", Richard M. Nixon, House Doc. No 91-363, 91st Cong., 2nd Sess. (July 8, 1970).

14 Hearings on S.2035, Senate Subcommittee on Indian Affairs, 92nd Cong., 1st Sess. (November 22-23 1971) at p.13.

15 Remarks of Attorney General John Mitchell, Indian Economic Meeting, October 29, 1971.

16 "Indian Trust Council Authority" Senate Hearings on S.1012 and S.1339, 93rd Cong., 2nd Sess. (May 7-8, 1973); "Creation of the Indian Trust Council Authority" House Hearings on HR 6374 and HR 7494, 93rd Cong., 1st Sess. (August 6-September 18, 1973). See also A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources, 91st Cong., 2nd Sess., (December 15, 1970); Toward a New System for the Resolution of Indian Resource Claims, 47 NYU L.Rev. 1108 (1972).

(D.C., D.C., 1973)[17].

This condition, in analogous contexts has been strongly condemned by this Court. In Northern Pacific R.R. Co. v. U.S., 227 U.S. 355 (1913) at issue was a Yakima survey of its boundaries conducted by the government, which later was determined to be in error.

> "If the government may control the cession and control the survey, and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter but as effective as fraud. We should hesitate to put the government in that attitude." 227 U.S. at 366.

It is in this environment that Congress adopted ANCSA in December, 1971, 104 years after the acquisition of Alaska; 104 years of the indignity of squatting on "government-owned land".[18]

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17 Edwardsen held the Secretary of the Interior had failed to protect Eskimo aboriginal lands, pre-ANCSA, from third party trespasses and ordered the United States to sue such trespassers for damages. The action was brought by Petitioner Paul, on behalf of these clients, against the Secretary charged with approving the instant contracts. Enough said.

18 Tee-Hit-Ton v. U.S., 348 U.S. 272, 291 (1955); Petitioner Paul is a Tee-Hit-Ton of the Tlingit Nation.

But on December 19, 1971, it was no longer government-owned, it was their land And make no mistake, it was the lawyers that did it.

As in Northern Pacific, supra, if the Congress can control the selection of counsel and also determine compensation without minimal standards of fairness, it affords no lesser "a means of rapacity", as effective as fraud.

We can offer no further legal analysis as to the merits of our position than that offered in our Brief of Petitioners under the principal rationales of Arizona Grocery v. Atcheson R.R. Co., 284 U.S. 370 (1932), Perry v. U.S., 294 U.S. 330 (1934) and Mineworkers v. Illinois Bar Association, 389 U.S. 217 (1967). Suffice it to say, the exercise of apparent plenary, omnipotent power in the context of Native Americans' legitimate aspirations to resolve political and legal conflicts cannot be allowed to stand. The sentence is far to harsh in balance with the powers government otherwise enjoys.

CONCLUSION

The main thrust of the Respondent's brief is that on the merits, Petitioners should have lost below; therefore, the case is unworthy of review. We assert that on the merits, Petitioners have shown substantial arguments in their support, so that the court on review would have to reach the major issues of the Petition, Due Process, Just Compensation, Indian Commerce and Property Clauses and their reconciliation, one with another.

Secondly, it is time that the Court, through the Petition Clause, recognize the dignity of the office of a lawyer, that it is he who can bring social peace in our society, that without protecting such office the Court demeans the Petition Clause and delays the progress of social peace. The Petition Clause comprehends the right to counsel.

Respectfully,

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P O. Box 348
Fairbanks, Alaska 99707

Dear Barry,

Thank you for writing me concerning the Petition for Writ of Certiorari in Paul v. United States and Jackson v. United States.

I support the Petition for Writ of Certiorari, and am pleased to share with you the reasons for my support.

As you know as a former Solicitor for the Department of the Interior, holding that position from 1960 to 1961, and as a United States Senator from Alaska since 1968, I am intimately familiar with the congressional proceedings held upon, and the causes generating the need for the Alaska Native Claims Settlement Act (ANCSA).

I was a member of the conference committee which reported out the statute as enacted. I am also intimately familiar with the implementation of that Act and the Congress' consideration of amendments

to ANCSA in 1976. Alaska Native Claims Settlement Act Amendments, Pub. L. No. 94-204, 89 Stat. 1145 (1976) (codified at 43 U.S.C. §§1615-1627). Additionally, you also know that I was deeply involved in the D-2 legislation known officially as the Alaska National Interest Lands Conservation Act, Pub. L. 96-487, 94 Stat. 2371 (1980) (codified in scattered sections of 16, 43 U.S.C.).

It is not my intention in writing to take a position on the merits of your particular fee claim nor the procedural problems associated with bringing it. However, the general questions posed for resolution, in my judgment, are of substantial importance for the guidance of Congress and the Judiciary. The two issues presented which I consider important are: (1) whether the First Amendment petition clause comprehends the vesting, for just compensation purposes, of a contingent fee attorney's contract with an Indian tribe; and (2) whether the Fifth Amendment due process clause comprehends a retroactive abrogation of previously regulated attorneys' contracts, approved by federal agency action, and vested within the meaning of the just compensation clause. The presentation of these issues by you and your co-petitioners has caused me to reflect upon past Congressional action now approaching the 12-year mark. My remarks will be confined, however, to the First Amendment issue.

First, there were a number of issues concerning Alaska Natives. ANCSA is the legislative resolution to those problems,

and is the most significant departure from established American Indian policy ever enacted by the Congress. The Alaska Native settlement was not treated as a solution to the claims of Natives through quasi-sovereign tribal organizations, but through the creation of corporate entities, with unique Congressional directives. Because of the complexity of issues that ANCSA was intended to reach, the question of attorneys' fees payable to counsel for representing Natives was hardly considered at all, and certainly in no great depth.

Second, the oil industry had an enormous investment in exploratory operations on the North Slope, including almost $1 billion in risk capital paid to the State of Alaska in non-recourse mineral leases on unpatented land. The industry needed to construct the Trans-Alaska Pipeline, but environmental interests were extremely vocal with respect to problems associated with the pipeline's construction. Even with the authorization of the pipeline, related environmental questions were debated in Congress for an additional 10 years, resulting in the Alaska Lands legislation in 1980.

Finally, it should be noted that ANCSA has been described as the most complex piece of legislation ever enacted by the Congress. I do not know if that is true, but it is certainly quite an intricate piece of legislation. Its complexity was dictated by the various interests involved in its creation in the late 1960's. Paramount among those interests were those of the State which

was desperately in need of the land and tax base promised to it in the 1958 Statehood Act. The State's claims had been delayed for years by unsettled political, environmental and lands problems.

The attorneys' fee question with respect to Alaska Natives was quite different, both in theory and in practice, from the previous regulation of such Indian contracts. See 25 U.S.C.A. §81 (1983) [sic]. In Alaska, attorneys fee claims were approved on a statewide, rather than tribal basis. The regulatory scheme under §81 did not, at least on its face, provide for regional statewide approvals beyond the village level. Thus, when the Congress was considering the final version of ANCSA, it was noted by those involved that counsel for the Alaska Federation of Natives (AFN), a statewide association of regional and tribal groups and individuals, had no approved §81 contracts with the AFN. Many attorneys for regional or area associations were in similar situations. These attorneys had made an enormous contribution and it was clear that, absent a special provision in the statute, they would probably be barred for compensation for their services.

This, of course, would be an unacceptable consequence of the Act. Unfortunately, our legislative solution to the problem was too sweeping in nature. Rather than categorize counsel in §81 approved and non-approved groups, we took the path of least resistance by deciding to treat all retained attorneys the same by including in the Act the

language embodied in §22(a). This section voided all percentage contracts and required all attorneys and consultants to present claims, without differentiation, under §20 of the Act, against a two million dollar maximum fund. The modification was primarily to help the unprotected lawyers rather than to impact those with approved contract protections.

Barry, it is my recollection that there was no consideration of the due process or vesting implications of voiding previously approved and executed contracts for legal services. There was no substantial analysis of the services provided by various lawyers individually or in the aggregate. I hesitate to say we acted arbitrarily, but Congress gave little thought to this important matter.

Congress' action in this area raises some serious issues. I am especially troubled by the First Amendment issues raised by you and your co-petitioners. Since Watergate, Korea-gate and the self-analysis undertaken by the Congress of its own conduct, as well as that of other public officials, there is now a much more sophisticated understanding of ethics in government.

Even though still "chided" for their "contributions," lawyers and lobbyists are an absolutely essential part of the process which helps the Congress define, mold and develop the national conscience on a variety of public issues. The extent to which lawyers and lobbyists have access to our chambers and staffs, given the enormity of the issues we

confront, is in direct proportion to the amount of time and consideration we give a problem.

During consideration of ANCSA, the lobbying effort was extensive, encompassing the oil industry, the State of Alaska, the Alaska Chamber of Commerce, the environmental movement, the Alaska Natives and many other interests. Any one of these interest groups which is inadequately represented on legislation like ANCSA may suffer in the balance, unlike those that are afforded adequate representation before the Congress.

I do have great difficulty with §20 and §22 of ANCSA because they not only raise constitutional problems with respect to your claims, but also send a message for the future to other counsel that just compensation for services rendered to Native Americans will be denied. In my jdugment the Natives of Alaska, for a variety of reasons, were essentially denied the ability to petition the Congress for the better part of 100 years, not by laws, but in fact.

Congress should ask what other claims will come before us in the future, and who will be willing to represent those groups financially disadvantaged knowing that their claims for fees can be substantially reduced or voided retroactively? The answer is that few will take up the cause. That is why I believe that Native Americans, as a matter of constitutional interpretation, should have no less right to effective counsel and advocacy in the petitioning

of Congress. Again, it is my hope that the questions you have raised will be addressed by the Supreme Court, and you have my permission to use this statement in any of the mateirals that you do submit to the Court in support of your case.

Thank you again for bringing your case to my attention.

With best wishes,

Cordially,

/s/ TED STEVENS

Ted Stevens

(Original telecopy letter of Senator Stevens is in the offices of Blair F. Paul, counsel of record for Petitioners.)

No. 82-1215

IN THE

Supreme Court of the United States

OCTOBER, TERM, 1982

FREDERICK PAUL,
Petitioner,
v.
THE UNITED STATES

AND

BARRY JACKSON AND THOMAS FENTON,
Petitioner
v.
THE UNITED STATES

ON PETITION FOR
WRIT OF CERTIORARI TO
THE UNITED STATES COURT
OF APPEALS FOR THE
FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE OF THE NATIVE VILLAGE OF VENETIE

Native Village of Venetie, Pro Se

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April 21, 1983

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I. THE INTEREST OF AMICUS

The Neets'Ai Gwitch'In Tribe of Athapaskan Indians, reorganized by the United States, January 15, 1940, as the NATIVE VILLAGE OF VENETIE, pursuant to the Indian Reorganization Act, Sections 16 and 17 (48 Stat. 984, as amended by 49 Stat. 1250), as a civilized Tribe holds fee patent and claims a legal right to hold in fee title about 5.5 million acres of land north of the Yukon and Porcupine Rivers in Alaska, which it has occupied from time immemorial and prior to the passage of the Northwest Ordinance, 1 Stat. 50. The USSR, England and the United States recognized by treaty this land as "merely private property" of the Neets'Ai Gwitch'In Tribe.

During the period 1969 through 1971 it was represented by Thomas E. Fenton

and the firm of Jackson and Fenton, even though they and the Tribe were never able to secure a contract approved by the Secretary of Interior because the Department of Interior began disapproving contracts executed in the form suggested by the Department and failed or refused to advise our attorneys or the Tribe of a form of contract which would be approved. Even a contract which provided for a contingent fee based on usual hourly rates was disapproved by the Secretary.

So we are well aware of the difficulties we may have in the future in obtaining competant counsel to defend our land rights. For while we received recognition through Section 19(b) of ANCSA (43 USC 1618[b]) of our rights to 1,799,927.65 million acres of our land, we do not have recognition from the United States or the State of Alaska of

our rights to the balance of our lands or even an understanding of the legal basis of our rights after the passage of the Alaska Native Claims Settlement Act.

For example, even if the Neets'Ai Gwitch'In Athapaskan Tribe was determined by the United States to be uncivilized in 1867, by 1900 they were, through contact with missionaries, schooling, trade and commerce (Ft. Yukon was established nearby before 1867 by Hudson's Bay Company) civilized and still in the undisturbed ownership, use and occupancy of their lands. Thereby their inchoate rights to fee title to their lands ripened into fee title (under the Treaty of Cession) and cannot be disturbed by Congress (except under a 5th Amendment taking with adequate compensation, which ANCSA did not do or accomplish).

It would be most unfair and contra-

ry to the precepts of civilized behavior and the Constitution of the United States and the Treaty of Cession if Tribes in process of civilization were to be denied the benefits of the Treaty of Cession upon becoming recognized as civilized solely because Congress failed to deal with them and their property after the Treaty of Cession before they were considered civilized. The United States had a duty, as trustee, to protect their land rights, which it attempted to do in the 1884 Organic Act (under the influence of Helen Hunt Jackson and "Ramona"), but that attempt failed because of the unwillingness of white settlers and the U.S. District Court for Alaska to respect the clear meaning of the term "lands now occupied or claimed" by Alaska Natives.

But the Neets'Ai Gwitch'In Tribe

was not in fact disturbed in the possession of their lands before becoming civilized and to this day there are but scattered and occasional intrusions by others, incl ding the United States, upon the lands they use, occupy, and claim, by right of the Constitution, International Law, and the Treaty of Cession, to own in fee simple.

It is in light of these facts that the NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT for the Neets'Ai Gwitch'In Tribe urges this Court to grant certiorari in this case.

II. ARGUMENT: THE REASONS WHY THE NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT FOR THE NEETS'AI GWITCH'IN TRIBE BELIEVES THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

ISSUE NO. 1. The issues, as the Native Village of Venetie Tribal Government understands them, relate to the

right of civilized Alaska Natives to petition the United States government for a redress of grievances for the period from 1966 through December 18, 1971, leading to the enactment of the Alaska Native Claims Settlement Act, P.L. 92-203, 92nd Cong., 1st Sess., December 18, 1971, 85 Stat. 688, 43 USC 1600 et. seq.

FACTS. In 1968, the Athapaskan Villages (Tribes) of Nenana, Minto and Tanacross signed contracts with Barry Jackson and Thomas E. Fenton to represent them in the protection of their lands and culture, upon a contingent fee basis. Payment was to be made to them out of any recovery of money or land to the Tribes. The contracts provided that they were to be paid an "equitable amount" to be determined by the Secretary of the Interior or some independent

tribunal. The contracts were approved by the authorized representative of the Secretary of the Interior pursuant to 25 USC §81 and 25 CFR 88.1(c).

After they devoted four years of services comprehending some 2,400 hours of effort by them, the Settlement Act was passed by the Congress, and by its Section 22(a) their approved contracts were voided.

REASONS. The Native Village of Venetie Tribal Government believes that this is a direct restraint on its right to counsel and its right to petition the government for a redress of grievances. Assuming the Court of Claims' opinion stands as the law and if it correctly states the law as it then existed, any time a Tribe has wanted or wants to hire a lawyer, the lawyer will well know that even with a Congressionally authorized

and administratively approved contract, the Congress may void the same with impunity, at least in regard to matters involving claims against the United States. We remember well the difficulty Athapaskan Tribes of interior Alaska had over the years in retaining competent counsel on claims issues, which remains to this day as a direct product of the approval process and the apparent plenary power of Congress over such contracts. That would be most hurtful in any Indian Tribe's efforts to secure an advocate whose sole efforts are petitioning the government for a redress of the Tribe's grievances, for there would always be lurking in the advocate's mind, a legitimate concern as to his own status.

The Court below suggested that since the power imposed is not exercised until after the services are expended,

no significant impact on our right to counsel or to petition is experienced. Since in our case, and typical of Indian Tribes generally, we are both impecunious at the time the services are rendered and also barred by regulation (25 CFR 89.24) from paying contemporaneously, the only method of obtaining representation is through the device of contingent fee contracts. Those contracts necessarily must be as secure as a salary or retainer contract or we simply cannot compete in marketplace for competent counsel.

ISSUE NO. 2. The second issue, as the Native Village of Venetie Tribal Government understands it, is whether the Congress has the authority to expropriate the lawyer's services without compensation under the Fifth Amendment and the Tucker Act.

FACTS. Here, lawyers complied with the law, 25 USC §81, by securing Secretarial approval of the lawyer's performance of their duties under the contracts; the Congress voided the contracts and made it a crime to be paid other than through some proceedings before the Chief Commissioner of the Court of Claims; even so, they were paid only a portion of their services at, according to their claims, an inadequate rate and for the balance of their services they were paid nothing at all.

REASONS. It is, for the purposes of this case, inappropriate for us to comment, directly or indirectly on the propriety of the extent of Congress' plenary power under the Indian Commerce Clause. The power, suffice it to say, must be exercised at the very least in good faith, particularly where basic

constitutional rights are at issue. The Congress, in enacting ANCSA, was exercising its powers under that authority and it determined that as part of the settlement, attorney's fees ought to be included therein.

This decision was not at the urging of a single Native group or spokesman. Indeed, the President of the Arctic Slope Native Association, Joe Upickson, spoke in liberal support of the Native lawyer's position in testimony to the Congress (Hearings on HR 3100 etc., Subcomm. on Interior and Insular Affairs, Serial No. 92-10, May 7, 1971, at pg. 299). It is our position that absent a clear and compelling showing by the Congress of attorney misconduct or overreaching, the Indian Commerce Clause ought not to supplant the rights reserved to the people, including Indians,

under the Fifth and First Amendments. There, that purpose may be obtained by preserving Petitioners' right to just compensation for the taking of their property rights under their Federally approved contracts of employment with "Indian Tribes", without doing injury to Congress' power under the Indian Commerce Clause.

Surely, citizens should be able to rely upon a statute of the Congress, 25 USC §81, and upon the approval by the administrative agency, the Secretary of the Interior, having charge of the administration of the Congressionally mandated oversight; and when the value of this service is expropriated by the Congress, an obligation should arise, requiring payment for the value thereof from the United States Treasury. Surely, private property may not be taken for

public use without just compensation.

III. CONCLUSION.

These are important questions which should be addressed by this Court, affecting anyone seeking to petition the government for a redress of grievances, not solely Indian Tribes. Therefore, we ask this Court to grant the petition.

Respectfully submitted,

NEETS'AI GWITCH'IN ATHAPASKAN TRIBE by NATIVE VILLAGE OF [illegible]NETIE TRIBAL GOVERNMENT, Pro Se

By_____

EDWARD FRANK, First Chief

No. 82-1215

IN THE

Supreme Court of the United States

OCTOBER, TERM, 1982

FREDERICK PAUL,
Petitioner,
v.
THE UNITED STATES

AND

BARRY JACKSON AND THOMAS FENTON,
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THE UNITED STATES

ON PETITION FOR
WRIT OF CERTIORARI TO
THE UNITED STATES COURT
OF APPEALS FOR THE
FEDERAL CIRCUIT

AMICUS BRIEF OF TANANA CHIEFS CONFERENCE, INC.

TANANA

Robert Ashley
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Seattle, WA 98104
(206)292-9800

April 21, 1983

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I. THE INTEREST OF THE TANANA CHIEFS CONFERENCE, INC.

The Tanana Chiefs Conference, Inc. is the regional Native nonprofit corporation for the Interior of Alaska, and one of the twelve Alaska Native Regional Associations listed in the Alaska Native Claims Settlement Act. The Tanana Chiefs Conference is a federation of 43 Athabascan villages in the Yukon, Koyukuk, Tanana and Kuskokwim basins in Interior Alaska. It was deeply involved in the struggle which culminated in the passage of the Alaska Native Claims Settlement Act (hereinafter referred to as ANCSA). During this time, Barry Jackson and Thomas Fenton, petitioners herein, were land claims counsel to the Conference, and about seven member villages.

Although the assets under ANCSA were vested in regional and village business corporations, the member villages and the Tanana Chiefs Conference, Inc. continue as the tribal entities of the region, exercising governmental powers and providing the full range of social services to their people. It is in the interest of the Tanana Chiefs Conference to assure future access to counsel for Native American groups seeking to redress grievances and pursue claims against the United States. It is in this capacity that Tanana Chiefs seeks to participate in urging reversal of the decision below, which we view as impinging upon the ability of Native Americans to petition for redress of aboriginal and other claims.

II. THE REASONS WHY THE TANANA CHIEFS CONFERENCE, INC. BELIEVE THE PETITION FOR CERTIOARI SHOULD BE GRANTED

The Tanana Chiefs Conference, Inc. supports the petition for the reason that the questions presented are of enormous importance to the American Native community generally and Alaska Natives in particular. We are particularly and specifically aware of the enormous difficulties experienced by Petitioners Barry Jackson and Thomas Fenton in securing attorney contracts with our villages during the period of 1967 to 1971; the uncertainty of their security in these contracts; the extent and value of their services[1]; and the chaos created by the abrogation of their contractual rights as a result of the effect of Sec. 20 of ANCSA.

More importantly, we are also profoundly aware of the difficulties that Alaskan Native groups had in securing competent counsel to assist them during the critical years of the claims settlement movement.

It is in such a context that we view the question of access to Congress to settle aboriginal claims. The history of American settlement of aboriginal land claims has been a history of conquest, one-sided treaty negotiation, contracts of adhesion, and subsequent unilateral abrogation of rights. During most of these settlements, Indians were forced to deal in a foreign legal framework subject to the political winds of the time. We are unaware of any prior such settlements outside of claims litigation, wherein American Indians were represented by counsel. In this sense, the Alaska Native Claims Settlement Act was a unique example of civilized treatment of Native Americans. While the settlement may not be "fair" as we understand that concept, at least we had the benefit of counsel. We believe that this

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Note[1]: Barry Jackson was the architect or principal designer and draftsman of the settlement act, which was initially formulated in close consultation with his village clients.

access to counsel is ancillary to and a part of our First Amendment right to petition the government for a redress of grievances.

Though we and others were not denied the right to counsel, the decision of the lower court, if allowed to stand, will substantially inhibit attorneys from representing Native Americans. They will know that their compensation is totally at risk to the whims of Congress. Such a chilling effect will unjustifiably limit Native Americans' right to counsel to petition Congress.

We recognize that Congress has sought to regulate attorney contracts with Indian tribes. 25 USC Sec. 81. We believe that when we, in our tribal capacity, enter into fair and reasonable contracts under the provision of that statute, it is in our self-interest that those contractual arrangements be honored, particularly where those contracts meet a standard of government regulation at their inception, are approved by the Secretary of the Interior, and further provide for third party review and determination of fees. We know the abuse and possibility for mischief in this area, but absent a finding of overreaching, profiteering or wrongdoing, these contracts should not be interfered with. To do so is as much a denial of due process of law and the right to counsel as a bar to the courthouse or Congressional steps.

III. CONCLUSION

The questions before this Court fairly present these issues for careful review of their implications and we ask the Court to accept this matter for review.

TANANA CHIEFS CONFERENCE, INC., PRO SE

BY: /s/ William C. Williams
President

No. 82-1215

IN THE

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AMICUS BRIEF OF DONALD R. WRIGHT INDIVIDUALLY AND AS PRESIDENT OF THE ALASKA FEDERATION OF NATIVES

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April 21, 1983

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I. THE INTEREST OF AMICUS CURIAE, DONALD R. WRIGHT

Donald R. Wright, a member of the Neets'Ai Gwitch'In Tribe, an Athapaskan born in Nenana, Alaska, was President of the Cook Inlet Native Association, one of the twelve Alaska Native Regional Associations (1968-1969), and has been President of the Alaska Federation of Natives, an unincorporated association of Alaska Natives, since 1970 (which is not Alaska Federation of Natives, Incorporated, formed by Alaska Native Regional Corporations after the passage of the Alaska Native Claims Settlement Act, P.L. 92-203, 85 Stat. 688, 43 USC §1600 et. seq., hereafter referred to as ANCSA). Presently he is also agent for and consultant to the Native Village of Venetie, the Tribal Government for the Neets'Ai Gwitch'In Tribe.

As President of the Alaska Federation of Natives, he led the effort to secure a just and equitable settlement of the land claims of the aboriginal peoples of Alaska, from his election as President through December 18, 1971. That settlement, which in large part was dictated by the Alaska Native leadership, was a result of a team effort by the leaders, their attorneys and consultants, with the support of a broad range of lobbying groups, both nationally and within Alaska. And in that effort your petitioners played an invaluable role. Frederick Paul and his associcates devoted many thousands of hours on behalf of the Eskimos of the Arctic Slope. Barry Jackson was one of the architects and designers of the settlement, drafting the first comprehensive legislation for the Alaska Federation of

Natives, including regional and village corporations and the concept of selection by Natives of land to be retained, concepts which were initially developed in consultation with his village clients.

Both Frederick Paul (with his associates) and Barry Jackson performed invaluable services in the culmination, the successful effort to persuade the conference committee to meld the unacceptable House and Senate versions of ANCSA (instead of compromising them) into a version acceptable to Alaska's Native leadership.

Finally, as a further reason for interest, Donald R. Wright was one of the founders of the National Tribal Chairmen's Association.

And so, for these reasons, Donald R. Wright has a past, present and continuing interest in seeing that Alaska

Natives, and Native Americans generally, have effective access to Congress for the redress of grievances, access which cannot be effective without competant counsel.

II. ARGUMENT: THE REASONS WHY DONALD R. WRIGHT BELIEVES THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Donald R. Wright adopts the views of the other Amicus briefs filed (or expected to be filed) herein by the Tanana Chiefs Conference and the Native Village of Venetie Tribal Government. But your Amicus further submits that the effect of the decision below is pernicious in the extreme, and will effectively deny many Native Americans and others access to Congress.

For example, consider the effect of that decision if an Indian Tribe desires to claim land valued at $100,000,000.00.

If the tribal council and their attorneys seek a settlement from Congress, as the Alaskan Federation of Natives did, the attorneys may expect a fee, on the ANCSA scale, of 4/100 of 1% or $40,000.00 (if our land, with mineral rights, has an average value of only $100.00 an acre). Yet if they choose to seek redress in the courts for money damages, the attorneys may expect a fee of $10,000,000.00, certainly at least $6,000,000.00 (unless Congress, passing an appropriation to pay the judgment or other Congressional act, again expropriates the attorneys fee contracts). In these circumstances, which create an enormous conflict of interest between American Natives and their counsel, Donald R. Wright submits the usual effect will be to bar American Natives from seeking return of their lands by

Congressional settlement. Yet generally American Natives desire return of their lands, and not money damages.

On another point, the Court below held that petitioners should have filed suit to challenge the constitutionality of ANCSA within one year, as provided by §10 of ANCSA even though, as required by that section, they were not a duly authorized official of the State of Alaska. Petitioners could not have filed such a suit both because legal ethics prohibit an attack on an act they helped prepare and because such a suit would have or might have encouraged others who opposed the settlement to file suit challenging the act, to the detriment of their clients.

Nor, knowing the petitioners, would they have done so in violation of these obvious constrictions. Indeed, even

when it became obvious that Congress would impose a severe limitation on attorney fees under ANCSA, they did not cease or scale down their efforts on behalf of their clients, they increased their efforts to obtain an equitable and just settlement for their clients. As President of the Alaska Federation of Natives, I did not once, in 1970 or 1971, receive a complaint from our attorneys, although we all realized that Congress would not allow them equitable compensation for their efforts. And they did not file such actions, claiming their contracts were not voided, until long after the Act was accepted as generally constitutional.

But neither I nor Native Americans can expect such devotion to our cause in the future unless our counsel can expect to receive at lease an equitable

fee. And that is not possible under the decision below.

III. CONCLUSION.

The questions before this Court, as set out in the Petition, fairly present the issues raised, and because of their great importance both to Native Americans and to other Americans who seek to petition Congress for redress of grievances, the undersigned urges this Court to grant certiorari.

DONALD R. WRIGHT, Pro Se
Individually and as President of the
Alaska Federation of Natives